LIBRARY
SUPREME COURT, U.S.

519

Office-Supreme Court, U.S.
FILED
SEP 3 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NICHOLAS VISCARDI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE GILBERT
Counsel for Petitioner
401 Broadway
New York 13, New York
Member of the Bar of the
Supreme Court of the United States

EDMUND ALLEN ROSNER,
Of Counsel
401 Broadway
New York 13, N.Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	3
Reasons For Granting the Writ	8
1. Right to the Effective Assistance of Counsel	8
2. Right to be Tried on Charges Presented in an Indictment Returned by a Grand Jury	12
3. Under the Court's Charge Petitioner's Conviction May Have Been Based Upon a Jury Finding that an Overt Act Occurred as to Which No Proof Was Presented	14
Conclusion	15
Appendix A—Constitutional and Statutory Provisions	A-1
Appendix B—Opinion of Court of Appeals for the Second Circuit	A-4

Authorities Cited

Cases

Brookhart v. Janis, 384 U.S. 1 (1966)	10
Campbell v. United States, 352 F. 2d 359 (D.C. Cir. 1965)	8
Carnley v. Cochran, 369 U.S. 506 (1962)	9

PAGE

Craig v. United States, 217 F. 2d 355 (6th Cir. 1954) 9
Culp v. United States, 131 F. 2d 93 (8th Cir. 1942) 13
Ex Parte Bain, 121 U.S. 1 (1887) 13, 14
Fahy v. Connecticut, 375 U.S. 85 (1965) 11, 12
Fredericks v. United States, 292 Fed. 856 (9th Cir. 1923) 13
Glasser v. United States, 315 U.S. 60 (1942) 8
Henry v. Mississippi, 379 U.S. 443 (1965) 10
Miranda v. Arizona, 384 U.S. 436 (1966) 9
Napolitano v. United States, 340 F. 2d 313 (1st Cir. 1965) 13
Stirone v. United States, 361 U.S. 212 (1960) 13, 14
United States v. Ault, 263 Fed. 800 (D.C. Wash. 1920) 13
United States v. Negro, 164 F. 2d 168 (2d Cir. 1947) 13
U.S. v. Hayman, 342 U.S. 205 (1951) 9
Worthington v. United States, 1 F. 2d 154 (7th Cir.) cert. denied 266 U.S. 626 (1924) 13

Statutes

21 U.S.C. Sections 173 and 174 3
28 U.S.C. Section 1254(1) 2

Rule

F.R.C.P., Rule 43 3, 9, 10

United States Constitution

Fifth Amendment 3
Sixth Amendment 3, 8, 10

IN THE

Supreme Court of the United States

October Term, 1966

NICHOLAS VISCARDI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 8, 1966.*

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which is not yet reported is printed in appendix B hereto, *infra,* pages A-4 et seq.

There were no other opinions written in connection with this case.

---

* Petitioner's co-appellants in the Court below, Joseph Armone, Stephen Grammauta and Vincent Pacelli are filing separate petitions for a writ of certiorari to review the judgment of the Court below.

Jurisdiction

The judgment of the Second Circuit Court of Appeals was entered on July 8, 1966, an order extending petitioner's time to file a petition for a writ of certiorari to and including September 6, 1966 was made by Mr. Justice Harlan on August 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Was it prejudicial error in the circumstances of this case for the trial court to fail to advise petitioner, who had no previous contact with the criminal law and who had retained counsel who represented three co-defendants, of the possible hazards involved in not having separate counsel and of his right to have counsel appointed to direct his separate defense if he was indigent.

2. In a prosecution for violating the conspiracy provision of the Federal Narcotics Law, was petitioner's constitutional right to be prosecuted upon a Grand Jury's indictment violated by the substitution of proof of an overt act allegedly committed in furtherance of the conspiracy but, neither alleged in the indictment nor considered by the Grand Jury for proof of an overt act set forth in the indictment.

3. May one be convicted of conspiring to violate the narcotics law consistent with due process when under the Court's charge it is possible that the Defendant was convicted on the basis of a jury finding that an overt act as to which there was no competent proof was committed in furtherance of the conspiracy.

Constitutional Provisions and Statutes Involved

1. The constitutional provisions involved are the right to be proceeded against by a Grand Jury indictment guaranteed by the Fifth Amendment; the due process clause of the Fifth Amendment, and the right to the assistance of counsel clause of the Sixth Amendment to the United States Constitution.

2. The Statutory provisions involved are 21 U.S.C. Sections 173 and 174 and Federal Rules of Criminal Procedure, Rule 43. Each of the foregoing is set forth in pertinent part, in appendix A.

Statement

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 8, 1966, affirming the judgment of conviction entered in the United States District Court for the Southern District of New York on July 29, 1965 convicting petitioner and three others of conspiring to violate Sections 173 and 174 of Title 21 United States Code (543a, 544a, 610a).*

The indictment was returned on September 30, 1964 (1a).

Petitioner, a man who had never before been convicted of a crime (601a) was represented by retained counsel who also represented three co-defendants. At no time was petitioner advised by the trial court of the possible hazards inherent in this arrangement, nor did the court inquire of

* References with the prefix "R" are to the record on appeal in the Court of Appeals while those followed by "A" are to the joint appendix filed in the Court of Appeals.

petitioner as to whether his decision to proceed with shared counsel, was an informed one, nor did the court advise petitioner of his right to have counsel appointed to direct his separate defense, if he was indigent.

Prior to trial however, the government, after conceding that it was "a novel situation" for one lawyer to represent four defendants in a conspiracy trial, requested the court to ask petitioner's counsel if he knew of any reason why he couldn't represent these four defendants. The court said it assumed counsel had no such reason. Counsel stated that he discussed the matter with his clients and that they advised him that they felt there was no conflict (56a). The record does not reflect petitioner's presence during this proceeding and the Court of Appeals in its discussion of the issue did not assume petitioner's presence. (Opinion of Court of Appeals p. 2570-72)*

Petitioner testified in his own behalf at the trial. He denied any knowledge of or participation in, the conspiracy. He was the only defendant to produce a character witness in his behalf (R3296-97).

The testimony against petitioner was given by one man, Charles Hedges, a notorious convicted felon and admitted perjurer (R755, 19A-91A, R168, R171). He testified to a number of transfers to petitioner of packages presumably containing narcotics (100A, 109A, 141A, 142A, 146A, 147A). Assuming there was a conspiracy, the proof demonstrating petitioner's part in it was of a highly questionably character.

---

* The government in its brief to the Court of Appeals stated that petitioner was present during the proceeding. Petitioner stated in his reply brief that he had no recollection of this proceeding.

In his summation, petitioner's trial counsel devoted five pages to one co-defendant (R24-29,) three pages to another (R4034-37), five pages to petitioner (R4029-34) and forty-six pages to a third co-defendant (R3978-4024).

The minutes of the sentencing reveal that the Court was deeply concerned with petitioner, in contradistinction to the other defendants (601A). The court referred to his record of continuous gainful employment, and his clean previous record (601A). Additionally, the probation file herein, contains many letters received by the trial court, from professional men, community leaders and clergymen, attesting to petitioner's good character. (Opinion of Court of Appeals p. 2572). Petitioner was the only defendant to receive the minimum sentence allowed by law (604A-611A).

The indictment herein, describes 11 overt acts allegedly committed in furtherance of the conspiracy (25A-27A). The trial court ruled that only the overt acts committed within the applicable five year Statute of Limitations, that is, after September 30, 1959 would be submitted for the jury's consideration. It charged the jury that they must find the commission of one of two overt acts which were alleged to have occurred after September 30, 1959 (454A-456A).

Overt act no. 10, as set forth in the indictment stated (27A):

> "In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960, in the Southern District of New York, the Defendant Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York."

Thereafter, the government in a Bill of Particulars (53A) filed pursuant to the court's pretrial order (43A) made in response to a motion of one of petitioner's co-defendants (38A-42A) described overt act 10 as taking place during March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M. inside 207 Second Avenue, New York City (54A). 207 Second Avenue is of course a different location from that specified in the indictment (122 Second Avenue).

At the trial, no evidence was produced showing that in or about March of 1960, Joseph Armone was in the vicinity of 122 Second Avenue New York, New York as expressly set forth as overt act no. 10 of the indictment.

There was evidence however that in April or May 1960 Hedges had a conversation with Armone in Lulu's Bar located at 207 Second Avenue during which Hedges complained about the amount of his payments (159A). There was also testimony of a conversation between the same persons at the same place and some time in the same month concerning a counterfeit $100 bill passed by Hedges' cousin (164A-65A). During his charge the trial judge read the allegation of overt act 10 exactly as set forth in the indictment and stated:

> "As I recall the evidence here—and I say that is your recollection that controls, and not mine—overt act no. 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges and Godwin concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause (454A)."

After several hours deliberation the jury requested that the testimony relating to overt acts 10 and 11 be read to them. Thereafter the judge read to the jury in connection with act 10 the testimony of the conversation at Lulu's bar located at 207 Second Avenue concerning the counterfeit bill. The judge also again read the allegations of the indictment regarding act 10, which referred to Armones being in the vicinity of 122 Second Avenue. More deliberation followed and then the following note came from the jury:

> "Judge Bonsal, count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to rehear count 10 testimony, we reheard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's. These two locations are 5 blocks (approximately) apart.
>
> Can these (scratched out) (over) can 122 2 Ave. be thought of as 'the vicinity' or is 122 a different (scratched out) location of another, separate event?" (528-529A)

Petitioner's counsel asked the court to charge the jury that Lulu's Bar was not in the vicinity of the address mentioned in the indictment (530A). This request was joined in by co-counsel. The court charged the jury that the issue of "vicinity" presented a question of fact (530A), to which exception was taken (539A).

Long after the conclusion of the trial, there was a most unusual development. The court, apparently on its own motion discovered that the testimony which had been read to the jury in response to its request concerning overt act

no. 10, was not, in fact, the proper testimony. There was no connection between that testimony and the testimony which the Grand Jury had relied upon in returning the indictment (550A).

This was revealed to counsel in a post trial proceeding held on July 8, 1965 (549A et seq.). Counsel for all the defendants moved for a mistrial (575A et seq.). The motion was denied (564A).

Reasons For Granting the Writ

1. Right to the Effective Assistance of Counsel:

This court has taken cognizance of the dangers involved when criminal defendants share attorneys. In *Glasser* v. *United States,* 315 U.S. 60 (1942), the attorney for the defendant Glasser was assigned to represent a co-defendant at the opening of the trial over Glasser's objections that their interests might be inconsistent. This was held to constitute a denial of the effective assistance of counsel, Amendment 6, U.S. Constitution, and to be reversible error. The court stated, 315 U.S. at 76.

> "In conspiracy cases, where liberal rules of evidence and the wide latitude accorded the prosecution may and sometimes do operate unfairly against the individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance."

The scope of the *Glasser* case has been considerably broadened by recent decision of *Campbell* v. *United States,* 352 F. 2d 359 (D.C. Cir. 1965). In that case, two defendants

in a housebreaking case were represented by the same retained counsel. The case against Glenmore was much weaker than the case against Campbell. The trial judge failed, at the outset, to point out the dangers inherent in this arrangement. The conviction was reversed as to Glenmore, the court stating, 352 F. 2d at 361:

> "We are not setting up a rule that each co-defendant must be independently represented in each case. We hold only that a trial judge has a responsibility to assure the co-defendant's decision to proceed with one attorney is an informed decision. Since the trial judge herein apparently failed to fulfill this responsibility and Glenmore was clearly prejudiced by the fact that he shared an attorney with his co-defendant, his conviction must be reversed."

See also, *Craig* v. *United States*, 217 F. 2d 355 (6th Cir. 1954).

In this case, the Court of Appeals held that the trial judge's inquiry *of counsel* as to possible conflict of interest in this case sufficed to protect any rights petitioner may have had in the matter. (Opinion of Court of Appeals, p. 2571). The failure of the record to indicate petitioner's presence during this proceeding prevents the court from assuming his presence. *Carnley* v. *Cochran*, 369 U.S. 506 (1962), see also *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Glasser* v. *United States, supra*, indeed the Court of Appeals despite the government's urging did not indulge in such a presumption.

This Court has already indicated that a hearing of this kind must be conducted in the presence of the defendant. *U.S.* v. *Hayman*, 342 U.S. 205, 223 (1951); Federal Rules

of Criminal Procedure, Rule 43. It is difficult to reconcile the Circuit Court's holding that an attorney can effectively waive his client's Sixth Amendment right to the effective assistance of counsel which may be violated because of that attorney's possible conflict of interest, with other recent decisions of this Court. See, *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

In the instant case petitioner was clearly prejudiced by sharing counsel without being advised of the dangers of such a course. Before this case, petitioner had never been arrested, much less convicted of a crime. He had been gainfully employed as a milkman for 27 years, for the past 13 with the same employer. He was the only defendant for whom a character witness appeared. After conviction but prior to sentence the trial judge received many letters from community leaders, professional men and clergymen including a Catholic Bishop, testifying to petitioner's good character and requesting leniency for him. The people who wrote these letters could have been produced at the trial to testify as character witnesses on petitioner's behalf, either voluntarily or by subpoena. Except for his employer, they were not produced. The reason for their nonproduction is fairly apparent. A parade of character witnesses for petitioner would have placed his co-defendants in a very unfavorable light, undermining their chances for acquittal. As a result of his representation of four defendants and the conflict of interest inherent therein, petitioner's counsel was placed in an untenable position.

Another example of prejudice demonstrable from the record and reasonably attributable to petitioner's counsel's conflict of interest is the brief summation given on behalf

of petitioner. Five pages of trial transcript were devoted to petitioner, five pages to another co-defendant, three pages to another and forty-six pages to a third. It would hardly be an exaggeration to state that the brief summation made on behalf of petitioner was lost in the shuffle.

Moreover, it is certainly likely that if another attorney representing petitioner alone had given a summation on his behalf, the jury's attention would have been focused much more clearly on the strong points and equities of petitioner's case to his advantage.

The Court of Appeals disposed of petitioner's claims of demonstrable prejudice deriving from the court's failure to advise him of the hazards involved in sharing an attorney with three co-defendants by taking "judicial notice of the fact that many who would touch pen to paper would not stand up to be counted in person under oath and in court." (Opinion of Court of Appeals p. 2572). In doing this it apparently disregards the fact that these witnesses could have been subpoenaed. We can't presume that they would have been less candid under oath, in court, than they were in their letters. "Also brushing off a co-defendant in a summation can be effective strategy" (Opinion of Court of Appeals p. 2572). The Court of Appeals apparently holds that petitioner must conclusively establish that he was actually prejudiced as a result of his attorney's multiple representation before he can rely upon it as grounds for reversal in this case.

Although it is not free from doubt whether the harmless error doctrine applies at all where a specific Federal Constitutional Right has been violated, See, *Fahy* v. *Connecticut*, 375 U.S. 85 (1965), it is particularly inapplicable in a con-

flict of interest situation. Because, the conflict may manifest itself through errors of omission rather than commission and thus be difficult, if not impossible, to establish from a trial record. For example, an attorney may forego cross-examination beneficial to one client and unfavorable to others, or he may omit arguments in summation favorable to one and not to others, or he may forego calling witnesses favorable to one but not to others.

This court has already held that in order to demonstrate prejudice deriving from a constitutional violation, petitioner need only show that it is reasonably possible that the violation complained of might have contributed to his conviction. See *Fahy* v. *Connecticut, supra.*

Judged by this standard, which petitioner respectfully submits the Court of Appeals disregarded, the record demonstrates that the Trial Court's failure to advise petitioner of the hazards inherent in an arrangement wherein he was represented by an attorney who represented three co-defendants, as well, constitutes reversable constitutional error. Sixth Amendment, United States Constitution.

2. Right to be Tried on Charges Presented in an Indictment Returned by a Grand Jury:

The presentation of proof and the handling of the instructions to the jury with respect to overt act no. 10 would have been comic, were it not for the tragic consequences to the defendants.

The jury was evidently concerned with this particular overt act, as its repeated messages demonstrate. Yet, the testimony which was read to it not only varied from the overt act set forth in the indictment but, indeed, it had

nothing whatever to do with this act, since the testimony in the Grand Jury upon which the indictment was voted was completely different from the proof in the instant case. Thus, it has been conceded that overt act no. 10 was not proven. (Opinion of Court of Appeals, p. 2558).

The Court of Appeals relying upon *United States* v. *Negro,* 164 F. 2d 168 (2d Cir. 1947) (dicta); *Napolitano* v. *United States,* 340 F. 2d 313, 314 (1st Cir. 1965); *Culp* v. *United States,* 131 F. 2d 93, 100 (8th Cir. 1942); *Worthington* v. *United States,* 1 F. 2d 154, 155 (7th Cir.) cert. denied 266 U.S. 626 (1924) held that the substitution of proof of an unalleged for an alleged overt act committed in furtherance of a conspiracy does not constitute a fatal variance between indictment and proof. The court did recognize however that there was authority to the contrary, *Fredericks* v. *United States,* 292 Fed. 856 (9th Cir. 1923); *United States* v. *Ault,* 263 Fed. 800 (D.C. Wash. 1920). This Court has never approved the rationale relied upon by the Court of Appeals.

The Fifth Amendment requires that where the crime charged is a felony that prosecution be by Grand Jury indictment. After an indictment has been returned its charges may not be broadened through amendment except by the Grand Jury itself, *Stirone* v. *United States,* 361 U.S. 212 (1960); *Ex Parte Bain,* 121 U.S. 1 (1887). Yet the court did permit that in this case.

The Grand Jury which found this indictment charged overt act 10 as having occurred "in or about March of 1960" when the defendant "Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York." Neither this nor any other court can know that the Grand

Jury would have been willing to charge an incident occurring several blocks away at 207 Second Avenue as an overt act committed in furtherance of the conspiracy. It cannot be said with certainty that with the substitution of unalleged overt acts for overt act no. 10 described in the indictment, that petitioner was convicted solely on the charge made in the indictment the Grand Jury returned.

The right to have the Grand Jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Yet petitioner submits that that is what was done in this case. Because of the court's admission of evidence concerning unalleged overt acts and its charge, these unalleged overt acts may have been the basis upon which the trial jury convicted petitioner. If so, he was not convicted on a charge the Grand Jury made against him. This must be held to be fatal error. *Stirone* v. *U.S., supra; Ex Parte Bain, supra.*

3. Under the Court's Charge Petitioner's Conviction May Have Been Based Upon a Jury Finding that an Overt Act Occurred as to Which No Proof Was Presented:

Among other things, the trial court charged the jury that in order to convict the defendants they must find beyond a reasonable doubt that at least one of the overt acts 10 and 11 took place after September 30, 1959. He then read the allegation of overt act no. 10 exactly as set forth in the indictment, and stated that their recollection of the evidence was controlling (454a). It is conceded that there was no competent proof adduced upon the trial establishing that overt act no. 10 as described in the indictment had ever occurred. Since it is impossible to tell under the general verdict, upon which act the jury based its verdict, the

judgment must be reversed because it may have been based upon a finding unsupported by any competent proof.

4. Petitioner Viscardi hereby adopts all the points made by his co-defendants in their petitions for certiorari herein submitted separately, insofar as the same may be applicable to him.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE GILBERT
Counsel for Petitioner
401 Broadway
New York 13, New York
Member of the Bar of the
Supreme Court of the United States

EDMUND ALLEN ROSNER,
Of Counsel
401 Broadway
New York 13, N.Y.

Dated: September 2, 1966
New York, N. Y.

APPENDIX A

Constitutional and Statutory Provisions

Amendment V, United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

Amendment VI, United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Title 21, United States Code

§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

TITLE 21, UNITED STATES CODE

§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be

imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 43

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

APPENDIX B

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—September Term, 1965.

(Argued March 4, 1966 Decided July 8, 1966.)

Docket No. 30135

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH ARMONE, STEPHEN GRAMMAUTA, VINCENT PACELLI, and NICHOLAS VISCARDI,

Appellants.

Before:

LUMBARD, Chief Judge,
KAUFMAN, *Circuit Judge,* and FEINBERG, *Circuit Judge.**

Appeals by four appellants from judgments of conviction for violation of the federal narcotics laws, 21 U. S. C.§§173, 174, after a trial by jury before Dudley B. Bonsal, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

JEROME LEWIS of Brooklyn, N. Y., *for defendants-appellants Armone and Grammauta.*

* Argument heard as District Judge, sitting by designation.

Appendix B—Opinion of Court of Appeals

E. Barrett Prettyman, Jr. of Washington, D. C. (Robert Kasanof and Albert J. Krieger of New York, N. Y., on the brief), *for appellant Pacelli.*

Edmund A. Rosner of New York, N. Y. (Edward Cherney, on the brief), *for defendant-appellant Viscardi.*

Robert G. Morvillo of New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Howard L. Jacobs, Otto G. Obermaier, John S. Allee, on the brief), *for appellee.*

Feinberg, *Circuit Judge*:

Four defendants appeal from convictions of violating the conspiracy provision of the federal narcotics laws, 21 U. S. C. §§173, 174. The single-count indictment named twenty-eight co-conspirators, twelve of whom were charged as defendants. The trial was originally scheduled to begin on April 27, 1965, with eight of the named defendants; the remaining four had not yet been apprehended. On that morning, two of the defendants became fugitives, requiring a one-week continuance. The trial of the other six defendants began on May 3, 1965 before Judge Bonsal and a jury.[1] On June 22, 1965, the jury convicted appellants Joseph Armone, Stephen Grammauta, Vincent Pacelli and Nicholas Viscardi, and acquitted Alfred Armone and Alexander Schoenfeld. On July 29, 1965, Judge Bonsal sen-

[1] The six remaining defendants were severed.

tenced Joseph Armone to fifteen years, Grammauta to eight years, Pacelli to eighteen years, and Viscardi to five years.[2] We affirm the convictions as to all four appellants.

Since the main arguments in this court are not directed to the sufficiency of the evidence, the facts developed at the seven-week trial will not be outlined in detail.[3] Viewing the government's case after a jury verdict of guilty in the light most favorable to the prosecution, as we must, it was, briefly, that appellants, together with the co-defendants and co-conspirators, conspired from 1956 through 1960 to import and distribute heroin in the United States. The drugs originated in France, and would be smuggled into this country with the aid of couriers, who usually travelled as part of their occupations. For example, Clarence Aspelund, a seaman, would transport heroin for exporter Marius Aranci in Marseilles, and Charles Bourbonnais, a flight purser, would bring in the drug for Félix Barnier in Paris. Mauricio Rosal, a Guatemalan ambassador, and Etienne Tarditti, a French businessman, also acted as couriers for Barnier.

The couriers initially delivered the drugs, once in this country, to Joseph Cahill, whose base of operations was New York City; eventually, Charles Hedges and Nicholas Calamaris took Cahill's role. Joseph Armone, one of the importers, would direct the eventual sale of the drugs to domestic wholesalers Vincent Pacelli and Michael Ricucci.

---

[2] Pacelli and Armone were also fined $20,000.

[3] Appellants do contend, in urging reversal, that the evidence disclosed multiple conspiracies, rather than a single conspiracy, and therefore they were not connected up with the alleged single conspiracy. This point will be discussed *infra*.

Stephen Grammauta and Arnold Romano were also importers. Nicholas Viscardi acted as a storer of the narcotics pending delivery to wholesalers.

Many transactions were detailed at the trial. In 1956, Aspelund met Cahill in New York, and thereafter reported to his principal (Aranci) that Cahill had requested narcotics. A six or eight kilo delivery, by way of Norfolk (because of complications in the New York harbor), was the fruit of this meeting. For the next three years Aspelund would bring in heroin for Cahill about three times a year. Bourbonnais would also bring in narcotics for Cahill, several kilos at a time; both couriers were paid by Cahill. Hedges, meanwhile, became a domestic deliverer for the latter, and was introduced to the conspirators' rendezvous at the Amvets Club; he was eventually promoted to direct dealings with the couriers.

Heroin from Pierre Roulet, an airline steward, would be taken by Hedges at first to Cahill's apartment, and later on to his own, where it would be picked up by Viscardi. Hedges would also deliver to various automobiles under the control of conspirators. In 1958, Hedges was introduced to Pacelli, and arrangements were made for deliveries directly to him by Hedges. In November 1958, Hedges made a delivery to Grammauta, who drove off with Viscardi.

On occasion, Hedges would meet with Joseph Armone at the Amvets Club to discuss some aspect of the dealings with the exporters' couriers. Payments from wholesalers were often turned over to Armone or Grammauta by Hedges, as the latter became involved in sales by the importers. Pacelli would sometimes furnish an automobile for Hedges's trans-

portation. Hedges would pick up heroin at Viscardi's apartment, where it had been stored, for delivery to wholesalers, and he became a liaison between Armone and Pacelli. James Godwin, referred to in testimony quoted below in connection with the overt act problem, was Hedges's cousin; Godwin was often a witness to parts of the transactions involving Hedges and Pacelli.

During a lull in 1959-1960, Armone told Hedges that they would "get started" soon after a few things were "straightened out." Activity began again in February 1960, when Pacelli asked Hedges if he could obtain some heroin. Hedges relayed the request to Armone, who complained that Pacelli was not paying in advance, or a high enough price. Armone eventually relented and the transaction was consummated. A few months later, Hedges demanded more money from Armone for himself; the latter authorized an extra $50. In the fall of 1960, certain couriers were arrested; Hedges was convicted in the District of Connecticut in March 1961.[4] Godwin saw Armone that month in an attempt to raise collateral for Hedges's appeal bond. Armone said that he had no money; a few months later Godwin pointed out that unless Hedges was given some help, as in raising bail, he might cooperate with the government. Armone said that another conspirator had gone to prison and "kept his mouth shut and Charlie could do the same." In September 1964, the indictment in the present case was filed, and Hedges became the prosecution's leading witness.

The four appellants make various contentions on appeal. Their arguments will be considered, under the name of

---

[4] *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

the defendant primarily pressing the point. Those points raised by defendant Pacelli will be dealt with first; thereafter, to the extent that they have not already been covered, the arguments of Armone and Grammauta, made jointly, and Viscardi will be considered.

I. Pacelli

§174 *Inference*

Pacelli first argues that the trial judge's handling of the statutory inference set forth in 21 U. S. C. §174 violated his rights under the Fifth and Sixth Amendments. The words of the statute are:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

This provision was held constitutional over forty years ago. *Yee Hem* v. *United States,* 268 U. S. 178 (1925); see *Orozco-Vasquez* v. *United States,* 344 F. 2d 827, 829 (9th Cir. 1965); *United States* v. *Sorenson,* 330 F. 2d 1018, 1021 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965). Referring to this section, Judge Bonsal told the jury that:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
>
> * * * * *

> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that they have not offered an explanation as to their possession. You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally imported into the United States unless he has given you a satisfactory explanation of his possession.

Pacelli did not testify at the trial.[5] He first claims that this charge was an adverse comment on his failure to take the stand, depriving him of his Fifth Amendment rights not to be compelled to be a witness against himself and of due process. Pacelli also argues that the charge created a presumption against him because he did not take the stand and thereby violated 18 U. S. C. §3481.[6] Appellant relies heavily on the recent Supreme Court decision in *United States* v. *Gainey*, 380 U. S. 63 (1965). That case dealt with a provision in the Internal Revenue Code, which the Court recognized as similar to section 174. *United States* v. *Gainey*, *supra* at 64-65 n. 2. The Code provides that the presence of a defendant at a site where the business of a

---

[5] Neither did appellant Armone.

[6] In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

distiller is being carried on unlawfully is sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury." Int. Rev. Code of 1954, §5601(b)(2). In affirming the conviction of defendant Gainey, the Court upheld a charge similar to that given by Judge Bonsal and specifically rejected the contention that the charge could "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey supra* at 70-71. Similarly, in *United States* v. *Secondino,* 347 F. 2d 725 (2d Cir.), cert. denied, 382 U. S. 931 (1965), this court, relying on *Gainey* reached a similar conclusion with respect to section 174. See also *United States* v. *Christmann,* 298 F. 2d 651, 652-53 (2d Cir. 1962) (dictum); *Williams* v. *United States,* 328 F. 2d 256, 262 (8th Cir.), cert. denied, 377 U. S. 969 (1964).

Pacelli seeks support not from the holding of *Gainey,* but from its advice that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfacory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." *Id.* at 71 n. 7. We agree that this would be the better practice and suggest it be followed in the future. But the holding of *Gainey* is that mention of the statute does not require reversal so long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71. Defendant counters that Judge Bonsal, unlike the trial judge in *Gainey,* failed in this command because he did not make it clear that a defendant was not required personally to testify and that the "explanation" could come

from other evidence in the case. Pacelli urges with some force that the government's own request for charge would have told the jury that the explanation could have come from "the evidence in the case." However, Judge Bonsal did charge later in his instructions, after noting that certain defendants had testified, that:

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them or as any basis of any presumption or inference unfavorable to them. You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Somewhat earlier he had charged:

> Now, I mention these two defendants purely by way of example and for nothing else, because you will review the evidence and consider what reasonable inferences you find may be drawn therefrom with respect to each of the six defendants. As I said, it is for your determination what reasonable inferences may be drawn from the evidence. But I remind you again that after considering all of the evidence as to a particular defendant you find that two reasonable inferences may be drawn, one consistent with his innocence and one consistent with his guilt, you must acquit the defendant . . .

It would be hypertechnical, in the face of these instructions, to convert a general and accurate explanation of the section 174 permissible inference into a comment on defen-

dants' failure to take the stand.[7] Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference."

Allegedly prejudicial publicity

Appellant Pacelli next contends that publicity destroyed his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment, *Irvin* v. *Dowd,* 366 U. S. 717 (1961), and, in federal trials, buttressed by the supervisory power, see *Marshall* v. *United States,* 360 U. S. 310 (1959). The errors specifically claimed are denials of motions for a change of venue, a continuance, a mistrial, and an examination of the persons responsible for the publications here involved.

Pacelli was indicted on September 30, 1964. On January 11, 1965, the front page of a New York City newspaper with a large circulation featured a photograph of a young woman in what appears to be lingerie, and the banner headline FEAR MOB SLEW DOPE BIG'S GIRL. Bold face type over the caption asked Was She Killed To Seal Her Lips?[8] On

---

[7] In the portion of the charge dealing with the statutory inference, it would again be wiser practice to state also that the "explanation" can come from any evidence in the case and that the total evidence should be considered.

[8] The caption stated, in part:

> Nancy Sue Shelton . . . is missing. Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with. Nancy disappeared three months ago . . . after testifying before a grand jury looking into dope smuggling. Her boyfriend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance. . . . Story on page 3

page three appeared a banner headline and a sub-headline: Fear Dope Big's Girl Was Rubbed Out [and] Dancer Talked to Grand Jury And Promptly Vanished. There was another eye-catching picture of the young lady.[9] On January 12, another article on the subject appeared in the same newspaper under a prominent headline (Dope Mob Ordered Nancy Sue to Scram) on page five. Both stories identified Pacelli as the missing girl's boy friend "who trafficked in narcotics."

---

[9] The story said, in part:

> But Nancy Sue hasn't been seen for more than three months now, and the feds believe she is dead. Murdered—because she knew too much.
>
> * * * * *
>
> She was Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic.
>
> 200 Million Dope Ring
>
> Federal narcotics agents said that Pacelli was a member of a ring which smuggled more than $200 million worth of dope into the U. S. over a five-year period, even using Mauricio Rosal . . . as a courier. Rosal is doing a 15-year stretch.
>
> On Sept. 23, agents had Pacelli under surveillance at Lexington Ave. and 73d St. when Nancy Sue drove up in a taxi.
>
> Pacelli, 43, of 422 E. 118th St., paid her fare and helped her out of the cab. The couple strolled on 73rd St. to Third Ave. There, the agents took Pacelli into custody on a narcotics charge.
>
> * * * * *
>
> [Nancy Sue failed to return before the Grand Jury to finish her testimony shortly thereafter, the story continues.]
>
> The day after Nancy Sue testified the feds caught up with a longtime fugitive . . . a business associate of Pacelli.
>
> The authorities said the underworld assumed Nancy Sue talked and that others might be nabbed if she talked some more.
>
> * * * * *
>
> If by remote chance you see her, let the government know. Your anonymity will be protected.

Pacelli also points to a magazine article published approximately mid-way through the trial. The article appeared in a semi-scientific magazine addressed to laymen, with a national circulation of one and one-third million copies. Its contents are divided into departments, of which "Cars and Driving," "Home and Shop," and "TV, Radio and Electronics" are representational. In the June 1965 issue (apparently published about June 1), there appeared a six-page article, not referred to on the cover, but listed in the inside table of contents under "Special Reports." The article began mid-way through the issue, and was entitled "Our top anti-narcotics agent tells the inside story of how three nations combined to fight [the following in large type] The Dope-Smuggling Diplomats." The article is by-lined "by Henry L. Giordano as told to James C. G. Conniff." Mr. Giordano is identified under his photograph as Commissioner of the United States Bureau of Narcotics. The article describes the smashing of a narcotic smuggling ring which utilized diplomats as couriers, and is written in a popular, although unsensational, style. It identifies and has photographs of seven co-conspirators who were named in the indictment in the instant case, including one witness at the trial, and also names defendant Cahill (who was severed). The article did not mention any defendant tried below. On the day of publication, motions for a mistrial were made based on the article. The motions were denied, as was a later motion to vacate the verdict which was based in part on allegedly prejudicial publicity.

Since argument of this case, the Supreme Court has handed down its opinion in *Sheppard* v. *Maxwell*, ——

U. S. —— (1966). In considering the question of prejudicial publicity here raised, we have carefully read the *Sheppard* case and, take as our governing standard the following (*id.* at):

> Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

In *Sheppard,* the barrage of publicity reached carnival proportions, the jurors were "without adequate directions not to read or listen to anything concerning the case," there was no doubt that "this deluge of publicity reached at least some of the jury," "bedlam reigned at the courthouse," and the arrangements between the court and news media "caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.'" The Supreme Court stated that the basic reason for vacating the conviction was that the trial judge "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.* at .

None of these conditions can fairly be found in this case. There was no barrage of publicity. Complaint is made only of the publications described above. The two newspaper articles appeared on successive days in January,

sixteen weeks before trial. Thereafter, until the June 1 magazine article, apparently, nothing was written or said in the news media which would cause defendants to complain. A good part of this is undoubtedly due to the commendable foresight of the trial judge. A month before the trial, he asked the United States Attorney (with the concurrence of defense counsel) to request local news media not to publicize the trial. See *United States* v. *Bentvena*, 319 F. 2d 916, 934 (2d Cir.), cert. denied, 375 U. S. 940 (1963). The jurors were adequately and periodically warned not to read or listen to any accounts of the case in the media, and, in conducting the voir dire about the publications, the judge carefully walked the tightrope between exploring the jurors' knowledge and titillating their curiosity about material previously unknown to them.

Finally, we cannot fairly say, as the Court did in *Sheppard*, that there is no doubt that the publicity reached "at least some of the jury."[10] As to the magazine article published during the trial, the court below promptly inquired of the jury as follows:

> Before we adjourn for the day I would just like to tell you, you remember, I had been mentioning to you every day about any possible articles, radio or TV programs. My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have

[10] All jurors but one had read about the case in the newspapers or heard broadcasts about it. —— U. S. at ——.

> heard in the course of the trial. And since that has been brought to my attention, I would just like to ask each of you whether you have seen that article?
>
> Well, now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

We see no reason to disbelieve the jurors' negative response regarding an article which had just been published in a magazine of somewhat limited appeal. As to the newspaper articles published before trial, at the beginning of the trial the court conducted a detailed voir dire which included the newspaper reading habits of the prospective jurors. The judge asked all members of the panel to advise him if they had read or heard anything about narcotics in general which would interfere with their ability to render a fair and impartial verdict, and if they had read anything in the press or heard anything relating to the defendants on trial, and received negative responses. Eight of the jurors finally selected were asked which newspaper they read; two said they read the newspaper involved, and one said he read "most of them." Each juror was asked whether he knew of any reason preventing him from rendering a fair verdict, with a negative response in all cases. No objection appears to have been taken after the voir dire regarding the failure specifically to ask four of the jurors which newspapers they read. The newspaper articles appeared some sixteen weeks before trial. We regard this time lag between publication and trial as most significant. As we recently had occasion to say:

[T]he situation here is in no way comparable to that in *Marshall* v. *United States, supra,* where the Court reversed a conviction for unlawfully dispensing drugs where it was shown that seven jurors had been exposed to news articles which disclosed the defendant's prior criminal record and other information after the same material had been excluded from the trial by the trial judge. By direct contrast, the adverse publicity in the present case appeared several months prior to the trial and the importance of this time-lag cannot be overlooked. Both the Supreme Court and this court have indicated that the length of time between the publication of adverse publicity and the empanelling of the jury is a significant factor in assessing claims of prejudice resulting from pre-trial publicity. See *Beck* v. *Washington,* 369 U. S. 541, 556-558 (1961); *Stroble* v. *California,* 343 U. S. 181 (1952) (six weeks); *United States ex rel. Brown* v. *Smith,* 306 F. 2d 596, 603 (2d Cir. 1962), *cert. denied,* 372 U. S. 959 (1963) (three months). Since the articles involved here were twelve weeks old at the time the jury was empanelled, it is highly unlikely that they were retained in the memories of the jurors. As Judge Weinfeld has pointed out, it is a fact that "frequently in this large metropolitan district prospective jurors show little recall of past widely publicized matters . . ." *United States* v. *Kahaner,* 204 F. Supp. 921, 924 (S. D. N. Y. 1962).

United States v. *Bowe,* —— F. 2d —— (2d Cir. 1966).

Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall* v. *United States,* 360 U. S. 310, 312 (1959). Under all of

the circumstances of this case, including the time of the publicity, the steps taken by the trial judge to curb its effect on jurors, his careful exploration of its impact and the response of the jurors, we do not feel that the court below committed error. We do not believe a contrary result is required either by *Sheppard* or the cases cited in Pacelli's brief. We have already discussed the former; as to the latter, *Irvin* v. *Dowd,* 366 U. S. 717 (1961), involved a trial which "had become the *cause celebre*" of a small community. Eight of the twelve jurors selected thought petitioner was guilty in advance of trial. In *Marshall* v. *United States, supra,* several jurors read, during the trial, articles disclosing other crimes by petitioner. Here, of course, there is no evidence that jurors had read, much less remembered, the particular articles. *Estes* v. *Texas,* 381 U. S. 532 (1965), was another *cause celebre* involving a televised trial, and *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), involved a televised confession viewed by several members of the jury. The other authorities cited to us are equally distinguishable.

Overt act 10

The next asserted error is the treatment of an overt act, number 10 in the indictment. We note at the outset of discussion of this issue that the narcotics statute here involved contains a conspiracy provision which, unlike the general conspiracy statute, 18 U. S. C. §371, does not in terms require the doing of "any act to effect the object of the conspiracy." One district court has concluded that an overt act need not be proven under 21 U. S. C. §174.

United States v. *Gardner*, 202 F. Supp. 256 (N. D. Cal. 1962); *cf.* Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 948 (1959). As the government does not urge this ground, and as we believe the trial court committed no error in instructing the jury regarding the overt act, we do not think it necessary to explore this issue.

Of the eleven acts alleged in the indictment, only two were submitted to the jury; the trial judge held that the statute of limitations barred consideration of the other nine. The indictment alleged as overt act 10 that "in or about March of 1960," Joseph Armone was "in the vicinity of 122 Second Avenue, New York, New York." Thereafter, the government in a bill of particulars specified the act as taking place "during March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City." 207 Second Avenue was, of course, a different address from that specified in the indictment—122 Second Avenue.

At the trial, there was evidence that in April or May 1960, Hedges had a conversation with Armone in Lulu's Bar (conceded here to be located at 207 Second Avenue) during which Hedges complained about the amount of his payments. There was also testimony of a conversation between the same persons at the same place and some time in the same months concerning a counterfeit $100 bill passed by Godwin, Hedges's cousin and one of the co-conspirators. Hedges testified that in Lulu's Bar Joseph Armone told him that a counterfeit $100 bill given "them" by Godwin would cause trouble in the form of an investigation. Godwin gave testimony corroborating this conversation.

During his charge, Judge Bonsal read the allegation of overt act 10 in the indictment and stated:

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges and Godwin concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

After some deliberation, the jury requested that the testimony relating to overt acts 10 and 11 be read to them. Thereafter, pursuant to agreement of the parties, the judge read to the jury in connection with act 10 the testimony of the conversation at Lulu's Bar concerning the counterfeit bill. As already noted, it is conceded here that Lulu's Bar is at 207 Second Avenue. The judge also again read the allegations of the indictment regarding act 10. It will be recalled that this referred to Armone's being in the vicinity of 122 Second Avenue. More deliberation followed, and then the following note came from the jury:

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to re-hear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.
>
> These two locations are five blocks (approximately) apart.
>
> Can these [scratched out]

[over]

Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another, separate event?

Respectfully,

C. Burquist

The court thereupon told the jury that "everything you say here is exactly the truth" and that it was for them to determine whether 122 Second Avenue is in "the vicinity of" Lulu's Bar and the restaurant across the street. The jury was told to use its common sense. At no point did any defendant claim that the testimony concerning counterfeit money did not bear on overt act 10 or object on the ground that overt act 10 was in fact something different. In fact, as indicated above, defense counsel cooperated in selecting the testimony to be read to the jury.

A few weeks after the verdict, the trial judge summoned counsel to tell them he had learned that there had been no testimony relating to the conversation about the counterfeit bill before the Grand Jury. The judge believed that the Grand Jury in alleging overt act 10 had apparently intended the conversation in which Hedges asked for higher payments (that conversation also took place at Lulu's Bar at 207 Second Avenue). The judge thought it was "a mistake in which we all participated."

From this relatively simple set of circumstances and a trial judge's effort to bend over backwards to be fair, defendants have spawned a bewildering array of contentions, some of them inconsistent with each other. Pacelli's will be considered first. He first argues that the jurors' note meant to ask whether the "vicinity" of 122 Second Avenue

can be said to include 122 Second Avenue itself. His theory is that the jury, having heard still other evidence concerning events at that address,[11] and not knowing of the bill of particulars specifying 207 Second Avenue, thought that perhaps 122 Second Avenue could not be deemed (in law) to be in the vicinity of itself, and wanted to know. If this interpretation is correct, Pacelli continues, the judge's response could only be confusing because it focussed on a conversation at 207 Second Avenue. We think that this interpretation of the jury note—which was never raised below—does not rise to the level of "strained." The note explicitly refers to "two locations," including Lulu's Bar (which is at 207 Second Avenue), and their distance apart, and asks whether 122 can be thought of as "the vicinity," or whether it is the location of a different event. The note could only be interpreted reasonably as asking for the definition of "vicinity" vis-a-vis the two locations. If anything, by eliminating the possibility raised by Pacelli that the jury might tie up overt act 10 to other testimony of events at 122 Second Avenue, the trial judge helped, rather than harmed, defendants. Appellant argues that the possibility of confusion remained, thereby vitiating the verdict. However, the jury's note makes clear that it was following the testimony closely and was focussing sharply on the limited issue the trial judge had left with it.

Pacelli also claims he was deprived of a unanimous verdict because jurors might agree that act 10 was proven for different reasons; *i.e.*, some might consider events at

---

[11] There was testimony, not referred to above, that the Amvets Club at 122 Second Avenue was the scene of many events referred to in the evidence.

122 Second Avenue, while others might find the conversation at 207 Second Avenue occurred. Armone and Grammauta similarly argue that the court refused to charge that the jury had to agree unanimously one one or the other of the overt acts submitted to it, and not merely agree that an overt act had been proven. Whether this fragmentation of the unanimity requirement is impermissible need not be explored. As for Pacelli's claim, the judge's reply to the note in effect eliminated this possibility from the case. As for Armone and Grammauta's argument, the court's charge that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 and 11, in fact, took place . . . Now, if you find beyond a reasonable doubt that at least one of these two overt acts, 10 and 11, was committed," coupled with his instruction that the verdict be unanimous, adequately answers this objection. "You" and "your" obviously refer to the jury as a body; any supposition that the jurors would take the instructions to mean that they can fragment their findings on the elements of the offense (taking overt acts *arguendo* to be "elements" in this context) is strained conjecture.

Accepting the correct interpretation of the jury note *arguendo*, Pacelli next contends that there was no evidence of the distance between 122 and 207 Second Avenue, and the subject was not one that the jury could notice; hence, the jury either guessed at the distance or took a view, both of which courses are impermissible. Therefore, there was no way the jury could decide vicinity *vel non*, and the issue as to act 10 should not have gone to the trier of fact. This argument was again not made to the trial judge at any

time and for that reason, among others, cannot prevail here. In fact, appellants did not object to the court's endorsement of the jury's supposition as to the distance between the two places by telling it "everything you say here is exactly the truth."[12] In addition, there was sufficient evidence from which the jury could approximate the distance between the Amvets Club and Lulu's Bar as five blocks.[13]

The other appellants apparently argue that as a matter of law 207 and 122 Second Avenue could not be in the same "vicinity" and therefore the issue should not have been

---

[12] Appellants did urge the judge to take the entire issue from the jury as a matter of law.

[13] Despite the statement in Appellant Pacelli's Brief, p. 67, that "a search of the transcript reveals that *no testimony was presented from which the jurors might infer the distance between these two addresses*" (emphasis in original), there is at least the following in the record: Hedges testified that the address of the Amvets Club was 122 Second Avenue. Joint Appendix ("JA"), pp. 84a, 90a, 94a, 156a. He also testified that Lulu's Bar was at 13 Street and Second Avenue. *Id.* at 157a. Godwin testified that the bar was on 12 Street and Second Avenue. *Id.* at 220a. Sol Gold testified that he lived "at Second Avenue and 4th Street, 65." Record, p. 3600. Aspelund testified that the Phoenix Bar was on Second Avenue, between 12 and 14 Streets, JA, p. 197a, and on cross-examination stated it was between 10 and 12 Streets. Record, p. 1812. When asked "you gave the address [of the Phoenix Bar] 180 Second Avenue," Aspelund replied "I got it in France" (although he later professed not to have paid attention to the address at the time in question). *Id.* at 1812-18.

Knowing that 65 Second Avenue was at 4 Street and that 180 Second Avenue was between 10 and 14 Streets, the jury could reason that, in the area of Second Avenue in question, there were about 10 or 20 house numbers per block. This would locate the Amvets Club between about 6 and 12 Streets, or up to seven blocks from Lulu's Bar. Depending on what testimony as to various addresses was believed, the jury could easily have placed the distance between the club and the bar at "five blocks (approximately)," which is what it did.

submitted to the jury. This position is incorrect. Moreover, any error committed by the trial judge did not harm defendants. The sequence of events shows that there was here nothing more than an immaterial variance between the indictment and the proof—the indictment charging 122 Second Avenue and the proof showing 207 Second Avenue —and appellants were aware of the variance over six weeks before the trial began. See *United States* v. *Ansani*, 240 F. 2d 216, 223 (7th Cir.), cert. denied, 353 U. S. 936 (1957) (variance between Chicago and Cicero, Illinois, held immaterial); *Strauss* v. *United States*, 311 F. 2d 926, 932 (5th Cir.), cert. denied, 373 U. S. 910 (1963); *United States* v. *Glaze*, 313 F. 2d 757 (2d Cir. 1963). Therefore, the judge could have instructed the jury that the proof of act 10 did not specifically conform to the charge in the indictment but that the variance was immaterial. He could have gone on to say that if the jury believed that the conversation about the counterfeit bill took place at 207 Second Avenue in March or April of 1960, the prosecution had fulfilled its burden as to act 10.[14] Therefore, the judge created an additional issue of fact in his instruction that the jury consider whether 122 and 207 Second Avenue were in the same vicinity, and any error was not only harmless, but was beneficial to appellants. Pacelli also argues that the jury should have been instructed that different non-adjacent addresses are not in the "vicinity" of each other. "Vicinity" has been defined as "a surrounding area or district." Webster's Third New International Dictionary 2550 (1961). No one seriously contends that

[14] Subject, of course, to the requirement that the act be in furtherance of the conspiracy, discussed *infra*.

the jury had an erroneous idea of the approximate distances involved. Its note asserted that the distance was "five blocks (approximately)" and even appellant Pacelli's brief says no more than it is "closer to six blocks apart and on opposite sides of the street."

Appellants have three further major thrusts based on overt act 10: (1) the absence of any Grand Jury testimony about the counterfeit bill conversation was fatal error; (2) the conversation, in any event, was not an act in furtherance of the conspiracy; and (3) reception of the evidence violated the "other crimes" rule.

The first point is based on the premise that the failure of the Grand Jury to consider what developed at the trial as act 10 precludes consideration of the act by the petit jury. In *United States* v. *Negro*, 164 F. 2d 168 (2d Cir. 1947), appellants were convicted for a narcotics conspiracy. There was no evidence of the only overt act alleged in the indictment, but the government argued that another overt act had been proved. This court reversed for lack of evidence of the overt act alleged in the indictment because the trial judge had instructed the jury only as to this act and had not instructed the jury as to the proven (but unalleged) act. To avoid a problem at the impending retrial, the court considered the question of proving unalleged acts (*id.* at 173):

> We believe that, at least for some purposes, the overt act is not part of the crime. . . . Thus if, in the instant case, there had been no proof of any overt act other than that alleged, and if the defendant Bruchon had been acquitted, we think that, under the doctrine

> of double jeopardy, he could not subsequently have been convicted for a conspiracy on the same facts with the single exception that, in the second trial, a different overt act was alleged and proved. We think, also, that an overt act is not part of the crime in the sense that the act alleged must be proved, where another unalleged overt act is proved. . . .
>
> Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, such a variance justifies a request for continuance because of surprise.

Appellant Pacelli asks this court to disavow this dictum. Contrariwise, appellants Armone, Grammauta and Viscardi argue that the *Negro* case requires reversal here. The latter contention is clearly erroneous since, under *Negro*, a conviction may rest on an overt act not charged in the indictment. As to Pacelli's frontal attack on *Negro*, the rule of that case has also been accepted by three other courts of appeals, *Napolitano* v. *United States*, 340 F. 2d 313, 314 (1st Cir. 1965); *Culp* v. *United States*, 131 F. 2d 93, 100 (8th Cir. 1942); *Worthington* v. *United States*, 1 F. 2d 154, 155 (7th Cir.), cert. denied, 266 U. S. 626 (1924), although there is authority to the contrary, *Fredericks* v. *United States*, 292 Fed. 856 (9th Cir. 1923), and we see no reason not to adhere to the rule in this circuit.[15] Moreover, the essence of the charge against appellants is a criminal agreement. A principal reason for the overt act requirement in a conspiracy prosecution "is simply to manifest 'that the conspiracy is at work,' *Carlson* v. *United States*, 187 F. 2d 366, 370, and is neither a project

---

[15] For favorable law review comment on the rule, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 992-93 (1959).

still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates* v. *United States,* 354 U. S. 298, 334 (1957).[16] Where, as here, the unalleged overt act dealing with the counterfeit bill was inadvertently substituted for the alleged overt act dealing with conversation about commissions, defense counsel joined in focussing the jury's attention on testimony as to the former, no objection was made to the trial judge raising this issue, a fortiori no continuance was sought, and there was ample testimony as to the overt act referred to by the trial judge, reversal for the reasons urged by appellants is unwarranted.

As to the second contention, an overt act is an act "committed in pursuance of the agreement." *United States* v. *Agueci,* 310 F. 2d 817, 828 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants seem to argue that conversation cannot be an "act," and that, in any event, this conversation was not in furtherance of the conspiracy. However, much talk is "action" with direct legal consequences; *e.g.,* people "decide," "promise," and "reject." *Cf.* decisions holding telephone conversations to be overt acts, *Singer* v. *United States,* 208 F. 2d 477, 480 (6th Cir. 1953); *Bartoli* v. *United States,* 192 F. 2d 130, 132 (4th Cir. 1951); *Smith* v. *United States,* 92 F. 2d 460, 461 (9th Cir. 1937). Here we have a warning to co-conspirator Hedges by defendant Armone, after the conspirators had gone to the trouble of tracing the source of the counterfeit bill. We hold that this conversation qualified as an

[16] See Developments, *supra* note 15, at 945-49 (other rationales for overt act requirement).

"act." Moreover, the jury could find that Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators. The trial court left the issue of furtherance to the jury. We cannot say as a matter of law that the jury could not reasonably have concluded that this conversation, viewed in the context of the other evidence, was in furtherance of the conspiracy. Reliance on *Grunewald* v. *United States*, 353 U. S. 391 (1957), is misplaced, for there the Court stated (*id.* at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the present case, the objectives of the conspiracy—importation and distribution of narcotics—had not been completed at the time of the conversion. And we cannot say that the successful accomplishment of the crime did not necessitate concealment. Cf. *Mount* v. *United States*, 333 F. 2d 39, 44 (5th Cir.), cert. denied, 379 U. S. 900 (1964); *Atkins* v. *United States*, 307 F. 2d 937, 940 (9th Cir. 1962).

Finally, Armone and Grammauta argue that the reception of evidence pertaining to the counterfeit bill, and evidence relating to what may have been a different counterfeit bill (won in a dice game by Armone's nephew

and given to Armone's sister-in-law), violated the rule excluding proof of other crimes. But Armone himself was not shown to have passed or received counterfeit money knowingly and voluntarily; moreover, his relatives were not shown to have been knowingly connected with the counterfeit money either. This argument is without merit.

II. Armone and Grammauta

Hedges's testimony

Defendants Joseph Armone and Stephen Grammauta raise nine separate grounds, in addition to those already discussed, for reversing the jury verdict. Four of them have to do, in whole or in part, with the testimony of Charles Hedges, the chief witness for the prosecution. Thus, these appellants attack the adequacy of the trial court's instruction under *United States* v. *De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), which held that in certain circumstances prior sworn testimony of a witness could be admitted as substantive evidence, rather than for impeachment only. Hedges had previously been prosecuted in Connecticut, see *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963), and had given testimony contrary to his testimony in this trial. The court below charged that the jury could consider the prior testimony in weighing credibility, and could also consider it as affirmative evidence in this trial. An objection below to the instruction (apparently not made by these two appellants) related to the possibility that both the earlier and current testimony could be false. The trial court thereupon charged:

> Secondly, you remember I talked about Hedges' testimony at the Connecticut trial and I told you it is for you to judge on which occasion he was telling the truth. But, of course, it is equally within your province to find he was testifying falsely on both occasions. You can do that. You can find that or you can determine on which occasion he was telling the truth and in which part of his testimony he was telling the truth.

These instructions were clear and correct.

Armone and Grammauta next claim that cross-examination of Hedges was unduly limited. We have examined the specific instances cited and find no abuse of discretion in the limitation of this five and one-half day cross-examination. These appellants next contend that the federal rule allowing conviction on uncorroborated testimony of accomplices is not one of unvarying application, that it is the "better practice" to require corroboration and that the circumstances of this case call for the better practice. But a short time ago, this court stated:

> We cannot understand why they insist that the testimony of accomplices must be corroborated. The federal rule is clearly to the contrary. [Citations.]

United States v. *Kelly*, 349 F. 2d 720, 767 (2d Cir. 1965). Appellants also suggest we hold the accomplice testimony in this case incredible as a matter of law. The argument is completely without merit. *United States* v. *Aviles*, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U. S. 974, 982 (1960).

Appendix B—Opinion of Court of Appeals

Denial of continuance to Armone

Appellant Armone next contends that the court erroneously denied his motions for severance on account of illness during the trial. Armone had been shot in the chest some sixteen months before the trial started, but, according to his brief, still suffered at trial from a "pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition." Trial commenced on May 3, 1965, and the first mention thereafter of Armone's condition to the court was on May 19, when the trial judge, after being informed of a jury tampering incident, remanded all defendants. Thereafter, the judge allowed Armone to be treated by his personal physician on two occasions. On Tuesday, June 8, the trial was adjourned so that Armone could be taken to the hospital where he was examined by a government physician. The following day counsel moved for a severance, but a few hours of trial were held in the afternoon. The court stated that it would observe defendant. On June 10, the court was informed that Armone was being detained in the hospital, and two adjournments followed until Monday, June 14. That day and the next, counsel again objected to proceeding with trial, but the trial continued. Both sides rested on Tuesday, June 15, and after another day's adjournment final arguments started on Thursday, June 17. On the afternoon of June 15, the court took testimony from Armone and two physicians on the issue of competence to stand trial; the court also heard defendant again and another

doctor on June 17, and a fourth doctor on July 9, the latter date falling after conclusion of the trial.[17]

The determination of competence to stand trial is, of course, basically a question of fact and, as with appellate review of most factual issues, the higher court bows to the lower court unless an abuse of discretion is manifest. *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965); *United States* v. *Shotwell Mfg. Co.*, 287 F. 2d 667, 672 (7th Cir. 1961), aff'd on other grounds, 371 U. S. 341 (1963); *Stein* v. *United States*, 263 F. 2d 579, 581-82 (9th Cir. 1959); *United States* v. *Alker*, 260 F. 2d 135, 157 (3d Cir. 1958), cert. denied, 359 U. S. 906 (1959). Here at most there was a conflict of testimony, which the trial judge was in the better position to resolve. Despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence to stand trial during the period under attack. In the light of this evidence and the trial judge's grant of adjournments, we cannot say that he was clearly in error and abused his discretion.

Alleged other crimes testimony and guilt by association

Appellants Armone and Grammauta also claim that they were denied a fair trial by proof of other crimes or a propensity to commit them. Beside the counterfeit bill incidents, dealt with *supra*, they point to two answers given

---

[17] Since the judge had denied the motions before the trial ended, we have considered the record as it was before him then. It should be noted, however, that not infrequently competence to stand trial is determined after the fact or *nunc pro tunc*. Eg., *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965) (*per curiam*); *Johnston* v. *United States*, 292 F. 2d 51 (10th Cir.), cert. denied, 368 U. S. 906 (1961); *Wells* v. *United States*, 239 F. 2d 931 (D. C. Cir. 1956) (*per curiam*); see 18 U. S. C. §4245.

by Hedges on cross-examination. In one, responding to a question about an offer of a job, Hedges said that Joseph Cahill (a severed defendant) proposed that Hedges rob a bookmaker for "some defendants." The judge promptly instructed the jury to disregard this answer. The other answer came about as follows:

> Q. Did you testify at the Connecticut trial that you went down and brought Mr. Aspelund into the hotel?
> A. If I did your defendants would be up there,—

After immediate objection the question was rephrased and a different answer given. We think that these two brief, isolated outbursts, at most ambiguous, unavoidable when dealing with witnesses of Hedges's admitted background, coming out on cross-examination by the defense, and with no prosecutorial intent to improperly prejudice defendants, were patently harmless when considered in conjunction with the curative steps taken.

In the same vein, appellants also claim that admission into evidence of a nightclub photograph showing some defendants seated together and a telephone number book containing the names of several defendants was reversible error because they improperly created an impression of guilt by association. However, the prosecutor's summation included the following:

> The government is not trying to prove guilt by association, but isn't it some evidence of the conspiracy, that these people knew each other and that these people went out with each other?

* * * * *

> Once again, ladies and gentlemen, I am not talking about guilt by association, I am just talking about these people knowing each other and associating with other as some evidence.

At this point, the court told the jury "you can't find guilt by association" and that it had to "consider all the evidence as to the association." Thereafter, in his charge, the judge also said:

> Now, of course, you should not infer membership in a conspiracy merely because of family relationship, merely because some of the defendants may have had their pictures taken together, merely because of friendship between alleged co-conspirators. Of course, you can't find any defendant guilty merely by association.

Since agreement is an element of conspiracy, evidence of association is relevant. The judge properly charged the jury on how to handle the issue.

Since the photograph and telephone-and-address book had been seized incident to or after the arrest of co-defendant Cahill, appellants also claim that they were admissions of a co-conspirator made after his arrest and hence were inadmissible against them. But the evidence involved here was not offered under the admission exception to the hearsay rule to assert the truth of matter contained in an out-of-court statement. A photograph is not an out-of-court statement at all; both items of evidence, moreover, were in existence before the end of the conspiracy. A similar objection to the admission of ten to twelve kilos of heroin is also without merit.

Single or multiple conspiracies

Armone and Grammauta next contend that the evidence showed multiple conspiracies and thus prejudicially varied from the single conspiracy charged in the indictment; implicit in this argument is an alleged insufficiency of evidence linking them to a single conspiracy. They also assert that, in any vent, the instructions were not adequate and the verdict was mistaken on this point. Arguing variance, appellants rely essentially on facts disclosed in *United States* v. *Cianchetti, supra,* in which Hedges was a defendant and, it is claimed, the present defendants were not mentioned at trial. But in trial 1 there can be a conspiracy with several defendants, and in trial 2 there can be a different conspiracy with some of the same defendants or co-conspirators, or even the same conspiracy with other, different defendants being tried for the first time, all without fatal multiplicity in any case. The judge's charge adequantely distinguished between a single conspiracy and multiple conspiracies. As to any supposed insufficiency of evidence, the spare summary of the record *supra* (pp. 2537-2539) shows clear support for the jury's verdict. In any event, there is no indication that any variance rose to sufficient dimensions to be prejudicial. *United States* v. *Agueci,* 310 F. 2d 817, 827 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants claim that the court should have guided the jury by marshalling the facts, and should have told the jurors that Armone had to be connected with activities prior to entry of new sources of supply of narcotics, or those activities must be disregarded in determining his guilt. No exception was taken by coun-

sel to the charge on these two grounds, and we do not find "plain error" under Fed. R. Crim. P. 52(b). *Compare United States* v. *Kahaner*, 317 F. 2d 459, 479-80 n. 12 (2d Cir.), cert. denied, 375 U. S. 835, 836 (1963), *with United States* v. *Kelly*, 349 F. 2d 720, 757 (2d Cir. 1965).

Missing witness instruction

Finally, these appellants assign as error the court's missing witness instruction concerning one Andy Dillon. The court said:

> You recall that Godwin testified that he received a counterfeit $100 bill and said that it came from one Andy Dillon. Said Andy Dillon was not called to testify by either the government or the defendants, although I am informed that he was in the courtroom during the course of the trial.
>
> Mr. Dillon could have been called by either side as a witness so that from the failure of either side to call him, you may infer that his testimony might have been unfavorable to either the government or to the defendants. But it is equally within your discertion to draw no inference at all from the failure of the government or of the defendants to call Dillon as a witness.

Appellants point out that Dillon was associated by the evidence with Armone, that the government refused to stipulate and the court refused to allow counsel to tell the jury that Dillon had been subpoenaed by the government, and that the instruction included mention of the fact that Dillon was sitting in the courtroom during the trial (a fact brought to the court's attention by defense counsel). Counsel, after the charge, requested that the jury

be told the government had subpoenaed Dillon and that it should disregard any portion of the charge insofar as it allowed the drawing of an inference against defendants.

The instruction given by Judge Bonsal was a correct statement of the law, and may be given in the absence of a request. *United States* v. *Llamas,* 280 F. 2d 392, 393 (2d Cir. 1960). The reference to Dillon's presence, while unnecessary, could not be prejudicial, since it merely indicated the foundation for the instruction. If the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented. In any event, no argument is made that Dillon was not in the courtroom. That the government may have been responsible for Dillon's presence is irrelevant. Appellants are in reality attacking the essence of the missing witness charge, *i.e.*, that the jury can draw an unfavorable inference from failure to put a witness on the stand; a defendant does not have the privilege of keeping the missing witness charge from the jury. Even if the government had not subpoenaed Dillon, the charge could have been given present some showing that he was available, if the other conditions for the charge were fulfilled. Hence, that the government subpoenaed Dillon is irrelevant. Since Dillon was undisputably available for each side, the charge was not erroneous. *United States* v. *Comulada,* 340 F. 2d 449, 452 (2d Cir.), cert. denied, 380 U. S. 978 (1965); *United States* v. *D'Angiolillo,* 340 F. 2d 453, 457 n. 5 (2d Cir.), cert. denied, 380 U. S. 955 (1965); cf. *United States* v. *Bergman,* 354 F. 2d 931, 935 (2d Cir. 1966) (witness equally unavailable to both; no inference should be drawn).

III. Viscardi

Statute of limitations

In addition to joining in contentions already discussed, appellant Viscardi raises two arguments applicable only to him. First, he attacks the court's charge on the statute of limitations. He argues that the evidence showed that before September 30, 1959 (the earliest date not barred by the statute), he took narcotics from Hedges, and after that time he delivered them to Hedges, and, therefore, the court should have instructed the jury to find "exactly which conspiratorial agreement he had entered into, and that such agreement continued past September 30, 1959." The short answer is that a shift in role, as appellant terms it, would not affect the statute of limitations. The conspiracy's vital elements (members and purposes) remained the same after September 1959, and we cannot say that a different job—at least one with as little difference as that involved here—would entail a different conspiracy vis-a-vis the conspirator involved. *United States* v. *Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), cert. denied, 379 U. S. 960 (1965), is not in point; that case dealt with the shifting objectives of the conspiracy. Viscardi was not tried for making a delivery to or receiving narcotics from Hedges; the charge was conspiring to effectuate much more generalized objectives, and whether he was a deliverer or recipient on any particular occasion would not be determinative of what he had conspired to achieve. It is, therefore, unnecessary to deal with the government's contention that Viscardi's function as "plant man" never did change.

Multiple representation

Viscardi also claims that he was prejudiced by sharing counsel with the two Armones and Grammauta and that the trial court's failure to apprise him of "the hazards inherent in sharing an attorney with the Armones and Grammauta" was error. The short answer to Viscardi's contention is that almost six months prior to trial, the government requested the court to inquire into the existence of a possible conflict of interest. The following interchange between government counsel and counsel for Viscardi, the two Armones, and Grammauta appears on the record:

> Mr. Jacobs: . . . [Y]our Honor, this case was on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.
>
> The Court: I assume he doesn't or he would have brought it to the attention of the Court.
>
> Mr. Lewis: That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

Viscardi relies upon *Glasser* v. *United States*, 315 U. S. 60 (1942), and *Campbell* v. *United States*, 352 F. 2d 359 (D. C. Cir. 1965). Nothing in *Glasser* requires the government or the court to take further steps after receiving such an assurance from an officer of the court. In *Campbell*, where a single attorney was retained by two defendants, the court reversed the convictions because the trial

judge did not inquire into whether the defendants knowingly accepted the risk of sharing defense counsel. We need not now decide how much of the *Campbell* case we accept as law in this circuit. We simply hold that the trial judge's inquiry of counsel as to possible conflict of interest in this case sufficed to protect any rights Viscardi may have had in the matter. The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances. Viscardi argues that his counsel might have devoted more time to him in final argument. Viscardi also points out that he had no previous criminal record, that he was the only defendant to produce a character witness, and that the trial judge received many letters in his behalf recommending leniency in sentence. He contends that his counsel might have suggested that additional character witnesses should testify during the trial, had it not been for the fact that this would have reflected adversely upon Armone and Grammauta, who presented no character witnesses. However, these are not weighty arguments. We can take judicial notice of the fact that many who would touch pen to paper will not stand up to be counted in person under oath and in court. Also, brushing off a co-defendant in summation can be effective strategy.[18] Cf. *United States* v. *Burkeen*, 355 F. 2d 241 (6th Cir. 1966).

We have considered all contentions made by appellants. Having found no reversible error, we affirm the convictions.

Judgments affirmed.

---

[18] It should be noted that defendant Alfred Armone, who was represented by the same counsel and received approximately as much attention in counsel's closing remarks as defendant Viscardi, was acquitted.

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 6 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1966

No. 527

VINCENT PACELLI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D. C. 20006

ROBERT KASANOF
52 Broadway
New York, New York 10004

ALBERT J. KRIEGER
401 Broadway
New York, New York 10013

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Statement	2
Questions Presented	3
Constitution and Statutes	4
Reasons for Granting the Writ	7
I. The Trial Court's Instructions Were Erroneous and Unconstitutional	7
A. The trial court commented adversely on petitioner's failure to testify and thus violated his rights under the Fifth and Sixth Amendments, Article III, and 18 U.S.C. § 3481	7
B. The trial court erroneously converted the statutory inference into a conclusion presumption and thus violated petitioner's Fifth and Sixth Amendment rights	21
II. Prejudicial Publicity Generated by Government Sources Destroyed Petitioner's Right to a Fair Trial by an Impartial Jury	24
(a) The New York Daily *News* articles	24
(b) The Popular Science article	27
(c) The publicity vitiated a fair trial	29
III. Petitioner Was Denied a Fair Trial and a Unanimous Jury Verdict by the Court's Submissions and Instructions to the Jury on Overt Act Ten	33
Conclusion	41

Appendix A (Opinion of Court Below)	App. 1a
Appendix B (Newspaper and Magazine Articles)	App. 38a

AUTHORITIES CITED

CASES: Page

American Publishing Co. v. *Fisher*, 116 U.S. 464 (1897) 38
Andres v. *United States*, 333 U.S. 740 (1948) 38
Barnett v. *Love*, 294 F.2d 585 (4th Cir. 1961) 37
Berger v. *United States*, 295 U.S. 78 (1935) 41
Bollenbach v. *United States*, 326 U.S. 607 (1946) 37
Chavez v. *United States*, 343 F.2d 85 (9th Cir. 1965) .. 13
Coppedge v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 509 (1959) 29
Davis v. *United States*, 357 F.2d 438 (1966) 20
Dear Check Quong v. *United States*, 82 U.S. App. D.C. 8, 160 F.2d 251 (1947) 21
Delaney v. *United States* 199 F.2d 107 (1st Cir. 1952) 26
De Luna v. *United States*, 308 F.2d 140 (5th Cir. 1962) 16
Estes v. *Texas*, 381 U.S. 532 (1965) 32
Ex Parte Bain, 121 U.S. 1 (1886) 39
Erwing v. *United States*, 323 F.2d 674 (9th Cir. 1963) 14
Grandi v. *United States*, 262 Fed. 123 (6th Cir. 1920) 41
Griego v. *United States*, 298 F.2d 845 (10th Cir. 1962) 21
Griffin v. *California*, 380 U.S. 609 (1965).....16, 20
Harris v. *United States*, 359 U.S. 19 (1959) 13
Harrison v. *United States*, 200 Fed. 662 (6th Cir. 1912) 41
Irvin v. *Dowd*, 366 U.S. 717 (1961) 26, 32
Jackson v. *United States*, — U.S. App. D.C. —, 359 F.2d 260 (1966) 40
Janko v. *United States*, 366 U.S. 716 (1961) 32
Johnson v. *United States*, 318 U.S. 189 (1943) 15
Kotteakos v. *United States*, 328 U.S. 750 (1946) 41
Krulewitch v. *United States*, 336 U.S. 440 (1949) 41
Linkletter v. *Walker*, 381 U.S. 618 (1965) 19
McFarland v. *American Sugar Ref. Co.*, 241 U.S. 79 (1916) 22
Malloy v. *Hogan*, 378 U.S. 1 (1964) 16
Marshall v. *United States*, 360 U.S. 310 (1959) ..26, 29, 33
Meyers v. *United States*, 3 F.2d 379 (2d Cir. 1924) .. 41
Michelson v. *United States*, 335 U.S. 469 (1948) 32
Ng Choy Fong v. *United States*, 245 Fed. 301 (9th Cir.), *cert. denied*, 245 U.S. 669 (1917) 21
Orozco-Vasquez v. *United States*, 344 F.2d 827, (9th Cir. 1965) 14
People v. *Moore*, 48 Cal. Rptr. 475 (D. C. App. 4th Cir. 1966) 20

Page

Pyle v. *Kansas*, 317 U.S. 213 (1942) 32
Remus v. *United States*, 291 Fed. 501 (6th Cir. 1923) .. 41
Rideau v. *Louisiana*, 373 U.S. 723 (1963) 26
Rodella v. *United States*, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 839 (1961) 13
Rosenberg v. *United States*, 13 F.2d 369 (9th Cir. 1926) 21
Roviaro v. *United States*, 353 U.S. 53 (1957) 13
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 32
State v. *Knudsen*, 217 A.2d 236 (Cir. Ct. Conn., App. Div. 1965) 20
Stirone v. *United States*, 361 U.S. 212 (1960) 38
Tipton v. *Socony Mobil Oil Co.*, 375 U.S. 34 (1963) .. 37
Tot v. *United States*, 319 U.S. 463 (1943) 14
United States v. *Accardo*, 298 F.2d 133 (7th Cir. 1962) 26, 29
United States v. *Christman*, 298 F.2d 651 (2d Cir. 1962) 17
United States v. *Dioguardi*, 147 (S.D.N.Y. 1956) 30
United States ex rel. Bloeth v. *Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963) 29
United States ex rel. Shott v. *Tehan*, 337 F.2d 990 (6th Cir. 1964), *remanded*, 382 U.S. 406 (1966) 15
United States v. *Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952) 30
United States v. *Gainey*, 380 U.S. 63 (1964) ...10, 11, 12, 13, 14, 15, 17, 19, 20, 22, 23
United States v. *Grassia*, 354 F.2d 27 (2d Cir. 1965), *pet. for cert. pending*, 35 U.S.L. Week 3002 (Oct. 1966 Term No. 56) 33
United States v. *Hernandez*, 282 F.2d 71 (1960), 290 F.2d 86 (1961) 14
United States v. *Negro*, 164 F.2d 168 (1947) 38
United States v. *Romano*, 382 U.S. 136 (1965) 14
United States v. *Santore*, 290 F.2d 51 (1960), 290 F.2d 74 (1960), *cert. denied*, 365 U.S. 834 (1961) 14
United States v. *Secondino*, 347 F.2d 725 (2d Cir. 1965) 17, 18
United States v. *Sorenson*, 330 F.2d 1018 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965) 14
United States v. *Ward*, 168 F.2d 226 (3d Cir. 1948) 16
United States v. *Wills*, 36 F.2d 855 (3d Cir. 1929) .. 41
White v. *Ragen*, 324 U.S. 760 (1945) 32
White v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962) 16

Page

Williams v. *United States*, 328 F.2d 256 (8th Cir.), *cert. denied*, 377 U.S. 969 (1964) 17
Wilson v. *United States*, 149 U.S. 60 (1892) 15
Yee Hem v. *United States*, 268 U.S. 178 (1924) 14, 21

BRIEFS AND RECORDS:

United States v. *Barrett* [*and Gainey*], October Term 1964, No. 13, Brief for the United States 12
United States v. *Gainey*, October Term 1964, No. 13, Brief for the Respondents 11
United States v. *Secondino* and *Massari*, Appendix to Defendant-Appellant's Brief 18

UNITED STATES CONSTITUTION:

Article III 3, 4, 7, 23
Fifth Amendment 3, 4, 7, 14, 16, 20, 21, 23
Sixth Amendment 3, 5, 7, 21, 23
Fourteenth Amendment 16

UNITED STATES CODE:

18 U.S.C. § 3481 .....3, 5, 7, 8, 18
21 U.S.C. § 173 ..... 2, 5
21 U.S.C.A. § 174 .....2, 6, 9, 10, 13, 14, 17, 18, 20, 21, 23
28 U.S.C. § 1254(1) 2

SECONDARY MATERIAL:

13 L. ed. 2d 1138 14

IN THE

Supreme Court of the United States

October Term 1966

No.

VINCENT PACELLI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vincent Pacelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on July 8, 1966.

Citations to Opinions Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit are unreported as yet and are printed as Appendix A hereto, *infra*, p. 1a. There was no opinion of the District Court.

Jurisdiction

The opinion of the Second Circuit was rendered on July 8, 1966. On August 10, 1966, Mr. Justice Harlan granted an extension of time to and including September 6, 1966, in which petitioner could file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Pacelli was indicted for violating 21 U.S.C. §§ 173 and 174. The indictment charged that Pacelli, eleven co-defendants and sixteen co-conspirators had engaged in a conspiracy to import narcotics into the United States and sell them illegally. Six of the defendants, including Pacelli, stood trial together. Four were found guilty and two not guilty. Pacelli received a sentence of eighteen years and a $20,000 fine.

The trial was long and sharply contested. The heart of the Government's case came from the testimony of a group of witnesses whose accomplishments in addition to trafficking in narcotics included perjury, armed robbery, adultery, and bastardy, and upon whom the Government had lavished substantial cuts in prison terms. As to Pacelli, the Government's direct case was wholly uncorroborated by disinterested witnesses. For the jurors the case was a difficult and troublesome one. They retired shortly after noon and did not return their verdict until four o'clock on the following afternoon.

The facts necessary to an understanding of the points presented by Pacelli are set forth in the subsequent portions of this petition which deal with those points. Suffice it to say here that the Government pre-

sented evidence which, if believed, tended to show the operation of a narcotics ring between France and the United States. According to the Government, Pacelli and a man named Schoenfeld were customers of an importation group. Narcotics were picked up from couriers traveling by air and delivered to customers in New York. The principal witness, Charles Hedges, was a self-described hoodlum (Tr. 425) who received a ten-year cut in his prison sentence. Most of the defense evidence directly or indirectly contradicted various aspects of the Government's case.

QUESTIONS PRESENTED

1. (a) In a criminal trial for participation in a conspiracy to violate the narcotic laws, did the trial court violate the self-incrimination and due process clauses of the Fifth Amendment; the right-to-trial provisions of both Article III, § 2, of the Constitution and the Sixth Amendment; and 18 U.S.C. § 3481, by charging the jurors three times that they could convict unless petitioner, who did not take the stand, explained his possession of narcotics to their satisfaction?

(b) Did the trial court by the same instructions convert the statutory inference into a conclusive presumption and thus violate petitioner's Fifth and Sixth Amendment rights?

2. Were petitioner's Fifth and Sixth Amendment rights to a fair trial by an impartial jury violated by (a) newspaper stories, generated by Government sources, which branded petitioner guilty of narcotic violations and in addition accused him of complicity in murder, and by (b) a national magazine article published midway in the trial which was authored by the head of the Government's Bureau of Narcotics and

which detailed the very conspiracy at issue in the trial?

3. (a) Was petitioner denied a fair trial and a unanimous jury verdict by submissions and instructions to the jury to the effect that the overt act alleged in the indictment could be proved by evidence of entirely different acts never presented to the Grand Jury, thus (a) inaccurately portraying the evidence, (b) allowing the jury to make an assumption not based on the evidence, (c) leaving to the jury an issue properly for the court, and (d) enhancing the confusion of an already badly-confused jury?

(b) If a jury must find one of two overt acts in order to convict and does not specify which one it relied upon, can a conviction stand after the judge purported to restrict the jury to the indictment but then specified as one of the overt acts an event which in fact had never been presented to the Grand Jury?

CONSTITUTION AND STATUTES

Article III, Section 2 of the Constitution of the United States provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * *.

The Fifth Amendment to the Constitution of the United States provides in part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

Title 18, United States Code, Section 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Title 21, United States Code, Section 173 provides:

> § 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, Section 174 provides:

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more

than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S INSTRUCTIONS WERE ERRONEOUS AND UNCONSTITUTIONAL

A. The trial court commented adversely on petitioner's failure to testify and thus violated his rights under the Fifth and Sixth Amendments, Article III, and 18 U.S.C. §3481

Three times during the course of his instructions, the trial judge told the jury that petitioner Pacelli had to explain to the jury his possession of narcotics. Pacelli did not explain his possession, because he never took the stand. Therefore, these instructions denied Pacelli his right guaranteed by the Fifth Amendment not to be compelled to be a witness against himself, due process of law guaranteed by the Fifth Amendment, and his right to trial by jury guaranteed both by Article III, § 2, of the Constitution and by the Sixth Amendment. The instructions also violated 18 U.S.C. § 3481.[1]

---

[1] "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory; the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The trial court instructed the jury in part:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, *unless the defendant explains the possession to your satisfaction,* may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
>
> * * * * * * *
>
> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that *they have not offered an explanation as to their possession.* You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally imported into the United States *unless he has given you a satisfactory explanation of his possession.* [J.A. 444a; emphasis added.]

Petitioner specifically objected to these instructions as being in violation of his constitutional and statutory rights, both before and after the instructions were given at trial, and in his brief to the Court of Appeals. (J.A. 368a-374a, 377a, 494a-495a; Brief for Appellant Pacelli, pp. 5, 23-36). The Court of Appeals specifically rejected petitioner's constitutional argument but ignored his argument under 18 U.S.C. § 3481. (App. 5a-9a.)

The trial court purportedly based its instruction upon 21 U.S.C.A. § 174, which provides:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Government realized that an instruction literally adopting and applying this statutory language would violate the petitioner's constitutional rights by forcing him to testify, by adversely commenting upon his failure to testify, and/or by using his failure to testify as a ground for convicting him. Therefore, the Government submitted the following language as part of its Request-to-Charge Number 7:

> You may draw the inference that the narcotics were illegally imported and the defendant knew of the illegal importation if you find the defendant had possession of the narcotics *and the evidence in the case does not provide a satisfactory explanation* of the defendant's possession, either actual or constructive. [Court's Ex. 6 for identification, J.A. 512a; emphasis added.]

This language would have correctly charged the jury that possession may lead to an inference of guilt unless *the evidence as a whole* provides an adequate explanation of that possession. The trial court, however, rejected this language and instead told the jury three times that the *defendant* must *explain* his possession.

The court did not even charge that the defendant must explain his possession by all of the evidence in the case. Such a charge, although still improper, at

least would have implied that the defendant could have offered an explanation by some means other than through his own mouth. Instead, the trial court instructed simply that the defendant must explain, and this charge could only have been taken to mean that the defendant must take the stand and make a statement setting forth the reasons for his possession of the narcotics.

The instructions, therefore, clearly transgressed the narrow rule laid down by this Court in *United States* v. *Gainey*, 380 U.S. 63 (1964). That case dealt with a provision in the Internal Revenue Code which the Court recognized as being similar to the narcotics statute involved here.[2] The Internal Revenue Code provided that the presence of a defendant at a site where the business of a distiller was being carried on was sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury * * *."

Gainey refused to apply this statutory language literally.[3] Instead, the Court made two rulings: First, the better practice is to instruct jurors that "they may draw the inference [of guilt] unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." 380 U.S. at 71 n. 7.

---

[2] After quoting the relevant Internal Revenue Code provision, the Court said: "Similar wording appears in 21 U.S.C. § 174 (1958 ed.), the Narcotics Import and Export Act of 1901* * *." 380 U.S. at 64 n. 2.

[3] Justices Black and Douglas dissented on the ground that despite the Court's narrow interpretation, the instructions under the Internal Revenue Code nevertheless constituted an improper comment on the defendant's failure to testify.

But more importantly, this Court ruled that the trial judge's overall reference in *Gainey* was "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71.[4]

This latter point was clearly supported by the charge in that case and emphasizes the difference between *Gainey* and the situation here, for the trial judge there told the jury *five* times that *all of the evidence* was to be considered in deciding whether presence at the still site had been satisfactorily explained.[5] These instructions—although not ideal, as the Court itself noted—were deemed to have made the point sufficiently that it is the total evidence, and not a statement from the defendant, that the jury must look to for an explanation of presence at the site of a still.

In the instant case, however, not only did the trial judge fail to state (or even imply) that the total evi-

[4] The Court so ruled even though the defendant-respondents did not argue that the instructions were invalid as a comment on their failure to testify. See *United States* v. *Gainey*, October Term 1964, No. 13, Brief for the Respondents.

[5] Thus, the court instructed that presence "would be a circumstance for you to consider *along with all the other testimony in the case;*" that presence "is a circumstance to be considered *along with all the other circumstances in the case* • • •;" that presence, "*together with other circumstances in the case,* if they are sufficient in your opinion to exclude every [other] reasonable conclusion," would authorize conviction; that presence can authorize conviction "unless the defendant *by the evidence in the case and by proven facts and circumstances* explains such presence to the satisfaction of the jury;" and that the jury need not convict even if the defendant, "*by the evidence in the case, facts and circumstances proved,*" failed to explain his presence. 380 U.S. at 69-70; emphasis added.

dence was to be considered, but he told the jury instead to look to the defendant himself for an explanation. This was done not by "allusion" or "innuendo"—which this Court conceded in *Gainey* would have been improper—but by specific, direct, unqualified, and unmistakable language that none of the twelve jurors possibly could have misunderstood.

The United States can hardly dispute that these instructions were improper, because it set forth the correct rule in its brief to this Court in the *Gainey* case:

> The explanation that overcomes the force of the presumption need not come from the defendant personally or even from his evidence. The explanation may be suggested by any evidence of the facts and circumstances, coming from any source (including the government's own witnesses), that explains how an innocent man happened to be there. Or the jury may reject the presumption because it is satisfied that proof of presence, taken in conjunction with all the other circumstances, will not support an inference that the defendant was, beyond a reasonable doubt, guilty of conduct constituting him a principal or accessory in the substantive offense. The judge so charged the jury in the present case * * *.[6]

We agree with this statement of the law. But it cannot be squared with the instructions at issue here. Nowhere did the trial court in this case tell the jury that the explanation of possession need not come from the defendant personally, that it could come from any source, or that the presumption, even if supported by evidence, could nevertheless be rejected in the light of all the other circumstances. The court not only

---

[6] *United States* v. *Barrett* [*and Gainey*], October Term 1964, No. 13, Brief for the United States, p. 13.

failed to make these points but excluded them from consideration by charging that a satisfactory explanation must come from the defendant. Under this charge, even if the jury had found that guilt was precluded by the evidence as a whole or by any part of it,[7] the jury would have had to convict because Pacelli did not personally come forward with an explanation.

During the discussion on the charge, the prosecutor, Mr. Jacobs, recognized that the trial judge was confused. Mr. Jacobs pointed out that the United States was *not* asking for § 174 to be read to the jury (J.A. 369a), that under *Gainey* the jurors should be told that "they can infer from possession knowledge of illegal importation" (J.A. 370a), that this Court disapproved of telling the jury it could infer guilt "unless it is explained away by the defendant" (*ibid.*), that *Gainey* "disapproved" of telling the jury "the defendants [must] unexplain being near the still" (J.A. 372a), that it is better to tell the jurors they could "infer" guilt "unless *the evidence in the case* explains it away" (*ibid.*; emphasis added), and that this Court "didn't think it was [a] good idea to read the statute to the jury and tell them it is a presumption" (*ibid.*). Thus, the prosecutor recognized that

---

[7] It is important to remember that the statutory inference does not reduce the offense to one of mere possession; the statute still requires proof that the narcotics were received and concealed, that they were imported contrary to law, and that the defendant knew of the unlawful importation. While possession under the statute creates an inference that each of these three essential elements has been established *prima facie*, an explanation of any one element is sufficient to rebut the entire inference. *Harris* v. *United States*, 359 U.S. 19, 23-24 (1959); *Roviaro* v. *United States*, 353 U.S. 53, 62-63 (1957); *Chavez* v. *United States*, 343 F.2d 85, 88-90 (9th Cir. 1965); *Rodella* v. *United States*, 286 F.2d 306, 310-313 (9th Cir. 960), *cert. denied*, 365 U.S. 889 (1961).

the trial judge was about to make a fatal error, but the judge ignored these admonitions, disregarded *Gainey*, and proceeded to instruct that the defendants must offer an explanation.[8]

It is no answer to say, as the Court of Appeals does (App. 6a), that § 174, upon which the judge relied, has been held constitutional.[9] The cases supporting constitutionality do not even intimate that an instruction such as that given in this case is proper. In *Yee Hem* v. *United States*, 268 U.S. 178 (1924), for example, the Court merely held that the statute does not violate the Fifth Amendment by forcing a defendant to take the stand; he can take the stand or not as he sees fit.[10] It certainly does not follow, as this Court

---

[8] The discussion preceding his charge (J.A. 368a-374a, Tr. 3723, especially at J.A. 369a-370a; see also J.A. 494a.) indicates that he was confused by the opinions of the Second Circuit in *United States* v. *Santore*, 290 F.2d 51 (1960), 290 F.2d 74 (1960), *cert. denied*, 365 U.S. 834 (1961), and *United States* v. *Hernandez*, 282 F.2d 71 (1960), 290 F.2d 86 (1961). The trial judge apparently took these opinions to mean that he must charge in the words of § 174 without explanatory or qualifying language. These decisions, of course, preceded *Gainey*. But even more to the point, they simply do not hold what the trial judge took them to hold, and the Court of Appeals does not claim that they do. The only issues decided in those cases were whether possession could be actual or constructive and how possession by one defendant affected a co-defendant.

[9] We do not foreclose or waive the argument that the presumption itself is unconstitutional—either because it forces the defendant to testify or because there is no valid connection between possession and the elements of the crime. *Cf. United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463 (1943); *Erwing* v. *United States*, 323 F.2d 674, 682 (9th Cir. 1963). See 13 L. ed 2d 1138.

[10] The same is true of the only other cases relied on by the Court of Appeals, *Orozco-Vasquez* v. *United States*, 344 F.2d 827, 829 (9th Cir. 1965), and *United States* v. *Sorenson*, 330 F.2d 1018, 1021 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965).

subsequently made clear in *Gainey*, that if the defendant chooses not to take the stand, the trial court may then comment on that fact by telling the jury that it can convict unless the defendant has satisfactorily explained his possession of narcotics. For the law precludes *every* adverse comment on a failure to testify —whether implied or direct, whether by court or by counsel.[11]

It is quite true, as pointed out by the Court of Appeals, that the District Court also gave the usual charge in this case that the defendants need not be witnesses and that their failure to testify must not be used against them. What the Court of Appeals failed to note, however, was that the adverse instruction on the defendants' failure to testify came at the very outset of the charge (J.A. 444a, Tr. 4136-37), whereas the instruction about their not having to testify was given at the end of the charge—*53 transcript pages later* (J.A. 485a-486a, Tr. 4190). This latter instruction was recited in a single paragraph (three sentences), and was not in any way related by the judge to his prior instruction. Thus, even assuming that the adverse instruction could have been cured by another, conflicting instruction, it certainly was not cured here, where one did not directly follow, refer to or even purport to overcome the other.

But more importantly, this and other courts repeatedly have held that the adverse effect of commenting on a defendant's failure to testify cannot be overcome by the simple expedient of stating that he

---

[11] *E.g., Wilson* v. *United States*, 149 U.S. 60 (1893); *Johnson* v. *United States*, 318 U.S. 189, 195-197 (1943); *United States ex rel. Shott* v. *Tehan*, 337 F.2d 990, 991 (6th Cir. 1964), *remanded*, 382 U.S. 406 (1966).

need not testify. Most typical of these cases is *Griffin* v. *California*, 380 U.S. 609 (1965), where the trial court specifically charged the jury that the defendant had a constitutional right not to testify. But the court also instructed that the jury could take into consideration the defendant's failure to "deny or explain" any evidence peculiarly within his own knowledge. Though the case came from a state court, this Court reversed, holding that the charge violated the defendant's rights under the Fifth Amendment, made applicable to the states under the Fourteenth.[12]

It is important to note that while each of these cases—and particularly the *Griffin* case—was argued

---

[12] See also *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Similarly, in *United States* v. *Ward*, 168 F.2d 226 (3d Cir. 1948), the trial judge charged that the defendant's failure to take the stand could be weighed by the jury. Even though the judge also instructed that the defendants did not have to take the stand and that their failure to take the stand must not be used to imply guilt, the Third Circuit Court of Appeals reversed. 168 F.2d at 227.

In *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962), the prosecutor stated to the jury during argument:

> The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice. [114 U.S. App. D.C. at 240, 314 F.2d at 245.]

Even though the court instructed the jury "that no inference of guilt arises against the defendant because of his failure to testify as a witness on his own behalf," the Court of Appeals reversed. 114 U.S. App. D.C. at 241, 314 F.2d at 246.

In *De Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), the prejudicial comments on the defendant's failure to testify came from a co-defendant's attorney. Although the judge instructed that a failure to testify cannot give rise to any inference against a nontestifying defendant, the Court of Appeals considered it unrealistic to think that *any* instruction to the jury could undo the prejudicial effects of the prior statement, and reversed the conviction. 308 F.2d at 154-155.

to the Court of Appeals, the opinion below does not mention or deal with a single one of them. The Court of Appeals instead relies entirely upon the later instruction and simply assumes that two conflicting instructions somehow canceled each other out.

The Court of Appeals, attempting to find precedent for its decision, said (App. 7a) that it had reached "a similar conclusion" in *United States* v. *Secondino*, 347 F.2d 725 (2d Cir. 1965).[13] No case chosen by the court could better demonstrate Pacelli's contentions, for in *Secondino*, when the trial court read § 174 to the jury, the defendant's attorney specifically called the problem to the court's attention, and the court then brought the jurors back and gave them the following instruction:

> You will recall that just before we left I had indicated to you that it was requested that I read part of the statute and in the statute it said something about possession. You recall that.
>
> Now, that statute that I just read doesn't change the fundamental law that a defendant is presumed innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon the defendant the burden or producing proof that the narcotic drug was lawfully imported *or any other evidence*. As previously stated the burden is always on the prosecution to prove the guilt beyond all reasonable doubt. What the statute means is that upon a trial for a violation thereof, if you should find from the evidence beyond a reasonable doubt that the defendant had possession of the narcotic drug,

[13] The two other cases cited by the Court of Appeals are not in point. In *United States* v. *Christmann*, 298 F.2d 651, 652 (2d Cir. 1962), the defendant testified in her own defense. In *Williams* v. *United States*, 328 F.2d 256, 262 (8th Cir.), *cert. denied*, 377 U.S. 969 (1964), the point at issue here was not even raised. Both of these cases, of course, preceded *Gainey*.

> as charged, the fact of such possession alone, *unless explained to the satisfaction of you,* permits you to draw the inference and find that the narcotic drug was imported contrary to law and to draw the further inference and find that the defendant had knowledge that the narcotic drug was imported contrary to law .
>
> In connection with any explanation a defendant may choose to offer for the possession of a narcotic drug, you are reminded that in the exercise of his constitutional right *the accused need not testify. Possession may be explained through other circumstances and other evidence independent of the testimony of the accused.*[14]

That is precisely the instruction the trial court did *not* give in the instant case. He did *not* tell the jurors that possession could be explained through evidence independent of the defendant's own testimony. On the contrary, he told the jury three times that *the defendant must explain* (J.A. 444a).[15]

The Court of Appeals attempts to avoid a reversal here by reciting that it would "be the better practice," to be "followed in the future," to instruct that the

---

[14] Appendix to Defendant-Appellant's Brief, *United States* v. *Secondino* and *Massari*, pp. 87a-88a; emphasis added. The court had also instructed that "A defendant under Title 18 of the United States Code, Section 3481, has an absolute right not to testify and you must not draw a presumption of guilt or any inference against the defendant because he didn't testify. * * * The law does not require the defendant to prove his innocence or to produce any evidence. * * *." *Id.* at 42a, 43a.

[15] Moreover, in *Secondino*, the objection was merely to the reading of Section 174 (see 347 F.2d at 727), and when the trial court instructed the jury further after the objection was made, "No new objection was taken" (*ibid.*). Here, of course, the objection is not merely to the reliance on § 174 but to the additional statements that the explanation of possession had to come from the defendant. And our objection has been preserved and renewed at every appropriate stage of the proceedings. *Supra*, p. 8.

inference can be drawn "unless the evidence in the case provides a satisfactory explanation" (App. 7a-8a), and further that "it would again be wiser practice to state also that the 'explanation' can come from any evidence in the case and that the total evidence should be considered" (App. 9a n. 7):

In the first place, there is no reason to believe that these admonitions will have any greater impact on trial courts in the future than the similar admonition by this Court in *Gainey*, which preceded the charge here and was specifically called to the attention of the District Court not only by defense counsel but by the prosecutor.

But even more to the point, a clear constitutional violation cannot be avoided simply by setting rules for the future. The admonition in *Gainey* was proper because the trial court in that case had rendered a constitutional—although not a perfect—charge. Neither "allusion nor innuendo" was present. Here, no one can possibly deny that the trial court *did* say—three times, in fact—that the defendants must explain, nor can anyone deny that the trial court did *not* say—even once—that the explanation could come from sources other than the defendants' own lips, much less from the evidence as a whole. Petitioner, on trial for a serious offense which resulted in a sentence of eighteen years and a $20,000 fine, was entitled to a constitutional and accurate charge.[16] The Fifth Circuit

[16] The prospective rules which this Court has deemed proper in such cases as *Linkletter* v. *Walker*, 381 U.S. 618 (1965), involve constitutional interpretations established for the first time in the decisions in those cases and therefore unknown to the lower courts at the time of trial. That certainly cannot be said of this case. The trial court below had the benefit of *Gainey*, of a long line of similar cases, and of the specific entreaties of the prosecutor—all of which were ignored.

recently reversed a conviction on Fifth Amendment grounds because the trial judge commented to defense counsel that he could put "your people" on the stand. *Davis* v. *United States*, 357 F.2d 438, 440-442 (1966). Surely that remark did not even approach in seriousness the specific instruction here that the defendant must offer an explanation.[17]

As we told the Court of Appeals during oral arguement, if the jury can be instructed in the words of § 174, that section is perforce unconstitutional. But this Court has avoided that dilemma by interpreting § 174 to mean that an adverse inference may be drawn from possession unless possession is explained by all or any part of the evidence in the case.

That was not the instruction given here. Once the trial court told the jury that Pacelli must explain his possession, and he in fact did not take the stand and therefore did not explain anything, his conviction was a foregone conclusion. The jury had to convict because Pacelli had not explained; no explanation of any kind had issued from his lips. Thus, his very refusal to testify—a refusal protected by the Constitution—became the touchstone of his conviction. The prejudice of such an instruction cannot be obviated or overcome by a conflicting instruction—particularly where, as here, the conflicting instruction follows the unconstitutional comment by 53 transcript pages and is not even worded so as to relate to or overcome the prior error.

---

[17] The charge here is similar to those which resulted in reversals in two recent state court decisions, one of which cited *Griffin* and the other *Gainey*. *People* v. *Moore*, 48 Cal. Rptr. 475, 476-477 (D.C. App. 4th Cir. 1966); *State* v. *Knudsen*, 217 A.2d 236 (Cir. Ct. Conn., App. Div. 1965).

B. The trial court erroneously converted the statutory inference into a conclusive presumption and thus violated petitioner's Fifth and Sixth Amendment rights

The Court of Appeals dismissed with only one sentence petitioners' contention that the trial court unconstitutionally converted an inference into a conclusive presumption. The court said:

> Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference." [App. 9a.]

But petitioner's contention cannot be dismissed so easily. As the discussion above makes clear, 21 U.S.C. § 174 "has laid down a rule, not of substantive law * * * but merely of evidence."[18] All the statute does, in fact, is to establish an inference of guilt upon proof of possession; it in no way sets up an irrebutable presumption.[19] As the Tenth Circuit has put it:

> The effect of the second paragraph [of § 174] is to insulate the prosecution against the hazard of a directed verdict when nothing more than possession is proved and to *authorize,* but not *require,* conviction when possession, not satisfactorily explained, is established. [*Griego* v. *United States, supra,* 298 F.2d at 848; emphasis added.]

Rebutting the inference does not even require affirmative evidence from the defense. It can be rebutted

---

[18] *Ng Choy Fong* v. *United States,* 245 Fed. 301, 305 (9th Cir.), *cert. denied,* 245 U.S. 669 (1917).

[19] *Yee Hem* v. *United States, supra,* 268 U.S. 178; *Griego* v. *United States,* 298 F.2d 845 (10th Cir. 1962); *Dear Check Quong* v. *United States,* 82 U.S. App. D.C. 8, 160 F.2d 251 (1947); *Rosenberg* v. *United States,* 13 F.2d 369 (9th Cir. 1926).

by the Government's own proof or by the record as a whole. The jury can simply ignore it. The only function of the statutory inference, in fact, is to allow the case to go to the jury when possession is shown and there is no additional proof of each element of the crime. As this Court has said, the inference does not even *require* the court to submit the case to the jury, nor does it preclude a judgment notwithstanding the verdict. *United States* v. *Gainey, supra,* 380 U.S. at 68.

It is vitally important, therefore, that the jury be told precisely how the statute is to be applied. Unless the jury is fully aware of the limitations on the inference, the statutory language in practical effect can render the Government's evidence of possession conclusive of guilt, particularly where the defendant has not taken the stand. Such a result would be constitutionally intolerable, for "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Ref. Co.,* 241 U.S. 79, 86 (1916).

The instructions in this case completely failed to inform the jurors of the various alternatives open to them in dealing with the inference. The judge stated that possession, "unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law;" that the Government contended it had shown possession and the defendants "have not offered an explanation as to their possession;" and that "you may infer" knowledge of illegal importation unless the defendant "has given you a satisfactory explanation of his possession" (J.A. 444a).

The two words "may" and "infer" clearly were not a sufficient explanation to the jury of the limited role played by the statutory inference. The court failed to say specifically that the inference was not conclusive, as this Court was careful to point out had been done in *Gainey*. 380 U.S. at 70. The court failed to say that the inference could be rebutted by a Government witness, by the Government's entire case, by defense evidence other than the testimony of the defendants themselves, or by the record as a whole. It failed to say that the inference could, in fact, be ignored. Instead, the entire thrust of the charge dealing with § 174 was that the *defendants* must rebut the inference. In the case of petitioner, who did not take the stand, the statutory inference thus became a conclusive presumption.

The instructions therefore misstated the statute as interpreted by this Court, and in addition violated petitioner's right to a jury trial under Article III, § 2, of the Constitution and the Sixth Amendment, and to due process of law under the Fifth Amendment.

The public interest in the resolution of these issues can hardly be overstated. Inferences akin to the one set out in § 174 now proliferate in statutes, both federal and state. The proper administration of justice as well as the protection of basic constitutional guarantees require that this Court now make clear, in the wake of *Gainey*, that instructions such as the one given in this case transgress the right of every defendant not to testify and not to have his guilt predetermined by Congress.

II. PREJUDICIAL PUBLICITY GENERATED BY GOVERNMENT SOURCES DESTROYED PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

(a) The New York Daily News articles

On January 11, 1965, almost four months after petitioner Pacelli was indicted, the first of a series of prejudical articles was sensationally featured on the front page of the New York Daily *News*, the largest selling newspaper in the United States with a circulation of 2,170,373 readers.[20] Headlines an inch and a half high proclaimed, "FEAR MOB SLEW DOPE BIG'S GIRL." A sub-title queried: "WAS SHE KILLED TO SEAL HER LIPS?" The story in the column adjoining the photograph recited that the girl's "boy friend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance." The article stated that the girl, Nancy Sue Shelton, had vanished three months ago, and "Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with."

The front page story was expanded in a five-column article on page 3 under the headline: "FEAR DOPE [illegible] WAS RUBBED OUT—DANCER TALKED TO GRAND JURY AND PROMPTLY VANISHED" (J.A. 50a; App. 39a). The authors stated that Nancy Sue was "Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic." Federal narcotics agents were reported as saying that Pacelli "was a member of a ring which smuggled more than $200 million worth

[20] J.A. 46a, 49a; App. 38a. The articles discussed here have been reproduced for the Court's convenience as Appendix B to this petition.

of dope into the U. S. over a five-year period, even using Mauricio Rosal, a one-time Guatemalan ambassador to the Netherlands, as a courier. Rosal is doing a 15-year stretch." The article added that "the feds caught up with a longtime fugitive" who was a "business associate of Pacelli," that Nancy Sue "met Pacelli and became his girl" in Las Vegas, that "Her friends were the wheels in the narcotics traffic," that some of her friends "are behind bars for long terms," and that others "are still walking around, ruining lives with their dope operations." Federal authorities were said to believe that Nancy Sue had been murdered to prevent her from disclosing information to the United States Attorney's Office after Pacelli's arrest.

A third highly prejudicial article appeared on January 12, 1965 (J.A. 51a; App. 40a). Miss Shelton was called the girl friend of "notorious dope smuggler Vince Pacelli." Again, petitioner was described as "active in a mob which imported $200 million in dope into the U. S."

In these three Daily *News* articles alone, Pacelli's name was specifically mentioned fourteen times.

Prior to trial, petitioner's counsel filed motions for a transfer of his trial to another district and for a continuance (J.A. 44a-45a). The trial judge denied the motions and petitioner's request to subpoena witnesses to present testimony on the issue of prejudice (J.A. 52a, 564a).

Before the jury was empaneled, trial counsel for petitioner requested the judge to ask the prospective jurors which newspapers they customarily read so as to determine whether any were regular readers of the

Daily *News*. Significantly, of the twelve jurors ultimately picked for the panel, two responded that they read the Daily *News* regularly (J.A. 69a, 71a), one read "most" of the New York papers (J.A. 73a), and four were never asked which newspapers they read (J.A. 67a, 70a, 72a-73a). Thus, only five members of the regular jury indicated that they were *not* readers of the Daily *News*.[21] Seven of the jurors might well have read the prejudicial articles. At one point, the judge interrupted the *voir dire* and was greeted with a show of hands when he asked the panel how many members read the Daily *News* regularly (J.A. 68a).

None of the jurors was asked specifically about the three damaging articles. Petitioner's counsel exhausted his preemptory challenges and was denied an additional preemptory challenge to remove an alternate juror who read the Daily *News* on the ground that other jurors also read the News (J.A. 79a).[22]

---

[21] Compare *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), where a murder conviction was reversed although only three members of the jury had seen the offensive publicity and all testified that they would render an impartial verdict (373 U.S. at 732) (dissenting opinion), and *Marshall* v. *United States*, 360 U.S. 310 (1959) (seven jurors exposed to publicity).

[22] In *United States* v. *Accardo*, 298 F.2d 133, 136 (7th Cir. 1962), the Court of Appeals stated that a factor in its decision to reverse was that defendant had not been offered unlimited peremptory challenges to protect against prejudicial newspaper publicity. Compare *Delaney* v. *United States*, 199 F.2d 107, 116 (1st Cir. 1952), where the Court of Appeals reversed for prejudicial publicity even though defendant's counsel failed to exhaust his preemptory causes, with *Irvin* v. *Dowd*, 366 U.S. 717, 724 (1961), where at the insistence of the accused who had exhausted his peremptory challenges the trial judge questioned certain jury members and received assurances of impartiality.

(b) The Popular Science Article

On June 1, 1965, mid-way in the trial, a six-page "Special Report" appeared in Popular Science Magazine—which in December, 1964, had a circulation of 1,332,895 (J.A. 295a; App. 41a).[23] The magazine was promptly brought to the attention of the trial judge (J.A. 289a). Under the headline, "ONE TOP ANTI-NARCOTICS AGENT TELLS THE INSIDE STORY OF HOW THREE NATIONS COMBINED TO FIGHT THE DOPE SMUGGLING DIPLOMATS," was a detailed story written by the Commissioner of the United States Bureau of Narcotics, Henry L. Giordano, whose picture and biography were prominently featured. Mr. Giordano claimed that the Federal Bureau of Narcotics had brought to justice an international ring of narcotic smugglers, comprised for the most part of the very men who were named as co-conspirators in this case. Photographs of seven of the co-conspirators involved in this case appeared in connection with accounts of their alleged participation in the narcotics ring. Defendant Cahill was also identified as a member of the ring. One of the men named by Mr. Giordano, Charles Bourbonnais, was not only a co-conspirator but a crucial prosecution witness who testified in this case for 486 pages of transcript (Tr. 2131-2617). The article made no reference to the fact that some of the convictions discussed were then under review by the Court of Appeals (J.A. 593a), or that the alleged narcotics operation was at issue in the instant pending trial.

---

[23] The magazine was thus *circulated* to one out of every 145 people in the United States and of course enjoyed an even wider readership. In contrast to its position on the magazine article, the Government told the Court of Appeals that so many people read the Daily *News*, it was "impractical" to try to exclude all its readers from the jury (Brief for the United States, p. 54 n.2).

The trial judge stated in strong terms that the Popular Science article should not have been released before the pending trial was concluded, voiced extreme displeasure with the publication and with the Bureau of Narcotics, and repeatedly demanded an explanation.[24] Nevertheless, the court erroneously denied petitioner's motions for a mistrial (J.A. 295a, 298a-299a) and for vacating the verdict (J.A. 597a). Instead, in a general question to the jury, the trial judge simply asked whether any juror had seen "a recent article in a magazine of national circulation" which mentioned some of the witnesses and other people whose names had been heard during the trial (J.A. 300a).[25]

---

[24] See, *e.g.*, J.A. 290a, 291a-292a, 294a, 296a, 299a, 589a.

The following statements illustrate the trial judge's reaction to the publication:

"I would like to know how it appeared, that the Bureau of Narcotics let this article get out of here" (J.A. 291a).

"Why did they release it at all before trial? I have trouble with that. And will you get an explanation of that?" (J.A. 291a-292a).

"The Bureau of Narcotics knew there was an indictment pending against these fellows and knew they were to be tried. I would like to get a report on that. * * * I think it is most unfortunate, I must agree" (J.A. 292a-293a).

"I am really very much concerned about this thing. I really think that it is a poor way for the Bureau of Narcotics to run the ballgame, I must confess that" (J.A. 299a).

The Government's totally inadequate explanation of the shocking publication was not provided until the day of sentencing (J.A. 589a-591a).

[25] The trial judge routinely instructed the jurors not to read about the case, narcotics or organized crime, or to listen to or watch programs about these subjects. However, his usual instruction was not to read anything in the "press", "papers" or "newspapers" (*e.g.*, Tr. 145, 331-332, 367, 1092-92a, 1466, 2122a, 2326, 2505, 2632, 3084-85), and no specific mention was ever made about not reading magazines, even after the Popular Science article appeared.

(c) The publicity vitiated a fair trial

The exceptionally prejudicial character of the foregoing articles is readily discernable upon a quick reading. Despite the fact that petitioner's trial had not yet begun, the Daily *News* articles quoted federal narcotics agents as stating flatly that he was guilty of the crime charged—participation in an international narcotics smuggling operation. Petitioner was repeatedly described as a "notorious dope smuggler" and a man who "played it tough" in the dope traffic. Worse yet, the articles made it clear that federal authorities suspected petitioner of complicity in the murder of his missing girl friend, although such a crime has never been charged or established.

The Popular Science article was an authoritative recitation by the United States Commissioner of Narcotics of the criminal conduct leading to the convictions of many of the men named as co-conspirators in the instant indictment for alleged participation in the closely-linked activities of an international narcotics importing ring.

The *News* and Popular Science stories thus constitute the very type of prejudicial information, inadmissible at trial, which repeatedly has been held to vitiate an impartial verdict.[26]

---

[26] For example, in *Marshall* v. *United States, supra,* this Court reversed a conviction for unlawfully dispensing drugs where seven jurors were exposed to two news accounts stating that the accused had a prior criminal record and had allegedly committed certain other offenses. Similarly in *United States* v. *Accardo, supra; United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2d Cir.), *cert. denied,* 372 U.S. 978 (1963), and *Coppedge* v. *United States,* 106 U.S. App. D.C. 275, 272 F.2d 509 (1959), reversals were ordered where newspaper articles had included defamatory characterizations and allegations as to criminal conduct by the

But this is far more than the ordinary case of prejudicial publicity. *For here, all of the articles sprang from governmental sources.*

We cannot stress this point too strongly. Despite the fact that it was argued to the Court of Appeals at length, both in our brief and at oral argument, the opinion below does not once mention it.

The Daily *News* articles appeared over three months after Nancy Sue Shelton's disappearance, contained a request for the submission of information to the Government and a promise of protection, and featured statements by the federal authorities as to petitioner's guilt and information which could have been given only by those authorities. It is quite obvious that these articles were instigated—or at the very least substantially filled out for reporters—by the Government. The Popular Science article was authored by the Commissioner of the United States Bureau of Narcotics, a man who could not possibly have failed to note that his article would be published around the time of petitioner's trial.

The Government did not contend before the Court of Appeals that these articles were not generated by Government officials or that this fact was irrelevant. Instead, the Government argued that "Governmental

---

defendant other than the offense for which he was then being tried. In *United States* v. *Florio*, 13 F.R.D. 296, (S.D.N.Y. 1952), the court granted the defendant's motion for a change of venue outside New York because a hostile climate had been created by prejudicial stories which referred to the defendant's notorious past and to alleged crimes unassociated with the crime charged in the indictment. An adjournment of several months was granted in *United States* v. *Dioguardi*, 147 F.Supp. 421 (S.D.N.Y. 1956), because newspaper publicity had identified the defendant as a co-conspirator of certain defendants convicted in another trial.

participation" could not compensate for what it called a complete absence of a showing of prejudice. (Brief for the United States, p. 56.) Significantly, the Government conceded in a footnote that "* * * there may be instances where the Government's participation in the publicity might be such as to call forth the Court's sanctions, but such conduct must be extremely gross * * *" (*id.* at 56 n.). We submit that "extremely gross" describes precisely the role of Government officials in this case.

Stories emanating from governmental sources have two vices. First, the reader quite naturally grants maximum credence to assertions of guilt, misconduct and bad character when they are made by persons who hold official titles, who receive governmental sanction, who presumably are in a position to know the facts, and who would seem to have no reason for stating a falsity. The degree of prejudice, in other words, is greatly enhanced when "federal authorities" or "federal agents" are relied upon and quoted. This is true to the ultimate degree when the man who is making the statements is actually in charge of the Federal Government's entire anti-narcotics operations.

Secondly, the Government simply must not be allowed to obtain criminal convictions by methods of this kind. The Government, when it chooses to give prejudicial information to the press or to go so far as to publish that information directly with an official stamp of approval, cannot be allowed the fruits of its own impropriety. These federal authorities knew that trials were imminent or actually under way; what possible excuse could they have had for taking part in these highly prejudicial articles? This case, in essence, is no different from any other in which the

Government has secured a conviction by improper methods and must thereby suffer a reversal.[27]

The Court of Appeals assumed there must be evidence that the jurors read and remembered the particular articles (App. 15a). This assumption runs directly counter to a number of this Court's rulings, the latest being *Sheppard* v. *Maxwell, supra.* There, the Court made patently clear that jurors' assurances of fairness and impartiality, and the absence of any showing of prejudice, are not dispositive of the publicity issue. Rather, it is "the probability of unfairness" that controls. 384 U.S. at 352.[28] And here, in

---

[27] *E.g., Plye* v. *Kansas,* 317 U.S. 213 (1942) (evidence vital to the defense intentionally withheld by the prosecution); *White* v. *Ragen,* 324 U.S. 760 (1945) (knowing use of perjured testimony by the prosecution); *Michelson* v. *United States,* 335 U.S. 469, 475 (1948) (improper reference by the prosecutor to the defendant's prior criminal record).

In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), the defense itself was guilty of engendering publicity—a factor not present here. Nevertheless, this Court took occasion to point out that Coroner Gerber, an Assistant County Attorney, Cleveland Police Captain Kerr, Detective Chief James McArthur and other officials were among those disseminating information to the press, and the Court was moved to observe: "The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action." 384 U.S. at 361.

[28] The Court has also held that where prejudice is "manifest" (*Irvin* v. *Dowd, supra,* 366 U.S. at 724), or "inherently suspect" (*Estes* v. *Texas,* 381 U.S. 532, 543-544 (1965)), sufficient prejudice to the accused for reversal will be presumed. See *Janko* v. *United States,* 366 U.S. 716 (1961), where the Court in a brief *per curiam* opinion reversed the petitioner's conviction upon confession of error by the Solicitor General. The Government conceded that the single article appearing on page 3 of a local paper on the second day of trial was so prejudicial that the trial judge had erred in not interrogating the jurors in order to assure himself as to whether the jurors had in fact read the article. The Solicitor

view of the stories themselves, their source, and the replies of jurors when questioned about their reading habits, the probability of unfairness to Pacelli has been amply demonstrated.

United States v. *Grassia,* 354 F.2d 27, 29-30 (2d Cir. 1965), *pet. for cert. pending,* 35 U.S.L. Week 3002 (Oct. 1966 Term No. 56), has pointed the way to the only proper result here. The court there recognized that under some circumstances, the generating of publicity by the Government may call for the sanction of dismissing the indictment, "in the interest of the particular defendant or for general therapeutic purposes, or for both" (*id.* at 29). We submit that precisely those circumstances are present in the instant case, and that the proper administration of the criminal law would be substantially advanced by a ruling to that effect by this Court.

III. PETITIONER WAS DENIED A FAIR TRIAL AND A UNANIMOUS JURY VERDICT BY THE COURT'S SUBMISSIONS AND INSTRUCTIONS TO THE JURY ON OVERT ACT TEN

The trial court correctly instructed the jury to convict only if it found beyond a reasonable doubt that at least one of two overt acts—number ten or number eleven—had occurred (J.A. 454a, 515a, 520a-522a).

The indictment alleged under overt act ten that: "In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960,

---

General expressed "substantial doubt" as to whether the inadmissible prejudicial information could be wiped out of a juror's mind, citing *Marshall* v. *United States, supra.* The article had contained references to the accused's prior criminal record and to the fact that a new trial had been granted previously because four jurors had read newspaper accounts of the charges against the accused.

in the Southern District of New York, the defendant Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York" (J.A. 27a). In reply to Pacelli's subsequent request for a bill of particulars, the Government stated that the tenth overt act occurred "during March or April of 1960, approximately between 1:00 p.m. and 5:00 p.m., inside 207 Second Avenue, New York City" (J.A. 54a).

The address mentioned in the indictment, 122 Second Avenue, is the site of the Amvets Club (J.A. 84a, 90a, 94a, 186, 192), whereas the address specified in the bill of particulars, 207 Second Avenue, is the location of Lulu's Bar (J.A. 157a, 164a-165a, 234a).

The judge told the jurors as to overt act ten that they must find that Joseph Armone had been "in the vicinity of" 122 Second Avenue (the Amvets Club) in furtherance of the conspiracy (J.A. 454a, 526a-527a). The judge added that as he recalled the evidence, overt act ten referred to an incident involving a counterfeit $100 bill (J.A. 454a).

At trial, the sole overt act offered in evidence as having occurred at or near the Amvets Club and not barred by the statute of limitations involved a conversation about whether Hedges could hold back $10,000 out of the $40,000 that he was supposed to pay. This conversation occurred in September of 1959 (J.A. 124a-125a). Several events were testified to as having occurred in or outside of Lulu's Bar, but it is clear from the dates that, regardless of what the jury may actually have *considered,* the only events within the time period specified in the indictment related to conversations about the counterfeit $100 bill and conversations about Hedges needing more money.

In other words, the judge purported to charge overt act ten in terms of the indictment, whereas actually he was specifying one of the events which had occurred at Lulu's Bar and which on cursory inspection would seem to have been intended by the bill of particulars.[29] This was an event which definitely had not been alleged in the indictment. The jurors, on the other hand, had never been told about the bill of particulars, nor had their attention been called to any discrepancies between the indictment and the evidence. Defense counsel objected to the submission of overt act ten to the jury (J.A. 495a-496a, 499a, 501a-502a, 525a-526a), and twice pointed out the variance and confusion between the indictment and the bill of particulars (J.A. 502a, 527a-528a).

After the jury had deliberated for several hours, it requested a reading of the testimony on overt acts ten and eleven (J.A. 522a). In reply to its request for the testimony on overt act ten, the Assistant United States Attorney and the attorney for three other defendants (see J.A. 550a) selected from the trial transcript evidence relating to the conversation about the counterfeit $100 bill, and this evidence was read to the jury (J.A. 523a-524a, 527a). After one hour and fifty-five minutes more of deliberation, the jury submitted the

---

[29] Actually, there were even discrepancies between the bill of particulars and the evidence developed at trial. The bill of particulars alleged an event involving Armone in March or April, whereas the evidence showed that the original transaction with the counterfeit $100 bill did not involve Armone, and the later discussion with Armone about the counterfeit $100 bill did not occur until April or May (See J.A. 164a-165a, 193a, 195a, 219a-221a, 234a-245a).

following written memorandum to the judge (Court's Exhibit No. 12):

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to rehear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.
>
> These two locations are five blocks' (approximately) apart.
>
> Can these [scratched out]
>
> [over]
>
> Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another separate event?
>
> Respectfully
>
> C. Burquist

A defense request that the note be reread was ignored (J.A. 529a).

In his reply to the jury, the judge instructed over Pacelli's objection (J.A. 537a, 539a-540a) that whether 207 Second Avenue was in the vicinity of 122 Second Avenue was a question of fact which the jurors should use their own common sense to resolve (J.A. 538a-539a).

More than a month after the conclusion of the trial, the judge called together counsel for both sides and informed them that he had found from the minutes that the Grand Jury had never been informed about the incident involving the counterfeit $100 bill, and that apparently the Grand Jury intended to base overt act ten on the conversations about Hedges needing more money (J.A. 550a-551a).

The fact is, however, that both the Grand Jury minutes read by the judge and the evidence at trial (J.A. 158a-159a) show that these conversations took place not at the Amvets Club, the address alleged in the indictment, but at Lulu's Bar. The Grand Jury may, in fact, have had an entirely different event in mind in charging overt act ten. The Grand Jury clearly did *not* have in mind the incident involving the counterfeit $100 bill.

The trial judge was correct when he concluded that "we have all been involved in a mistake as to what overt act number 10 was. * * * I think it is a mistake in which we all participated" (J.A. 552a; see also Tr. 4399). He committed reversible error, however, by denying Pacelli's motion to set aside the jury verdict because of the confusion and variance involving overt act ten (Tr. 4396).

If the jury intended to ask whether 207 Second Avenue was in the vicinity of 122 Second Avenue,[30] the facts reveal such total confusion of law and fact in the various submissions to the jury that a fair verdict could not have been reached.[31] Also, the jury's ques-

---

[30] We pointed out below that even the jury's note was not clear. The jury may have intended to ask whether "the vicinity" of 122 Second Avenue included acts in or at the same address.

[31] A jury's confusion may be inferred from its inquiry of the trial judge. *Barnett* v. *Love*, 294 F.2d 585 (4th Cir. 1961). And "When a jury makes explicit its difficulties a trial judge should clear them away with complete accuracy. * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U.S. 607, 612, 613 (1946). As a matter of fact, even in civil cases the judge, once he chooses to reply to a jurors' note, cannot mislead them but instead has a duty to be complete, fair and unambiguous in his reply. See *Tipton* v. *Socony Mobil Oil Co.*, 375 U.S. 34 (1963).

tion either made an assumption based on no evidence of record [32] or revealed an improper view of the scene by jurors. In addition, petitioner was deprived of his constitutional right to a unanimous verdict.[33] And finally, the court erroneously left to the jury an issue that should have been resolved by the court.

If the Court does not accept these contentions, it should overrule the dictum of the Second Circuit in *United States* v. *Negro,* 164 F.2d 168 (1947), adopted anew in the opinion below, and hold that the proof at trial of an overt act must conform to the overt act charged in the indictment. As the Court of Appeals conceded (App. 23a-24a), there is authority contrary to *Negro,* and this Court has never approved the *Negro* rationale.

The Court, in fact, indicated in *Stirone* v. *United States,* 361 U.S. 212 (1960); that there are a number

---

[32] The Court of Appeals attempts in a footnote (App. 21a n. 13) to glean out of this record some basis for the jury's conclusion as to the distance between 122 and 207 Second Avenue. We leave to the Court whether any jury could have wound its way through the maze set forth in this footnote. But even after its record search, the Court of Appeals could not divine any evidence that pinpointed the distance more specifically than "up to seven blocks".

[33] Certainly Armone's presence at two different places at two different times could not be said to constitute a single act or event. And the jury was not instructed that it must agree unanimously that one or both overt acts had occurred. Thus, the judge's instruction left the jury free to reach a non-unanimous verdict on whether any particular overt act had occurred. Some jurors well might have believed that Joseph Armone was present at 122 Second Avenue, but not at 207. Others may have believed that he was at 207, but not at 122. And yet such completely opposite factual determinations would have supported a verdict of guilty under the court's charge. See *Andres* v. *United States,* 333 U.S. 740 (1948); *American Publishing Co.* v. *Fisher,* 166 U.S. 464 (1897).

of reasons why proof at trial should conform to the indictment—including, in addition to the possibility of surprise and double jeopardy, the preservation of a defendant's right to be free from oppressive prosecution. The Court stated:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. [361 U.S. at 218 [34]]

Here, the Grand Jury had in mind one set of facts involving 122 Second Avenue when it charged overt act ten. The Government, as shown by its bill of particulars, had in mind another incident occurring some blocks away at 207 Second Avenue. The proof was scattered and confused, but apparently the Government intended the conviction to rest on the incident at 207 Second Avenue. In any event, the jury theoretically was instructed upon the basis of the indict-

---

[34] The Court then went on to revitalize its early opinion in *Ex Parte Bain*, 121 U.S. 1, 11 (1886), by quoting therefrom:

> Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passon or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of a oath, that there is good reason for his accusation and trial. [361 U.S. at 218 n. 3.]

ment, yet with evidence cited involving different events. And the jury, after sending its first note about overt act ten, was referred to evidence not about 122 Second Avenue but about 207 Second Avenue. When the jurors pointed out the conflict, the court in effect left the whole matter in their hands. Under these circumstances and in the light of this great confusion, a variance between proof and indictment is manifest, and the prejudice to Pacelli is self-evident.

The Court of Appeals argues that defense counsel joined in focusing on the counterfeit bill. But this ignores the fact that Pacelli's counsel *did* object, not only to the variance between the indictment and the bill of particulars but to the judge's reply to the jury's note.[35] The confusion initiated by the Government and engulfing the defense as well as the trial court cannot now be used as an excuse for the lack of a fair trial. Moreover, the Court of Appeals statement that "there was ample testimony as to the overt act referred to by the trial judge" (*i.e.*, the counterfeit bill conversation) overlooks the fact that because of the instructions, we have no way of knowing whether the jury *did* consider this incident as an overt act. We know only that the Grand Jury never considered it at all.

We submit that at least in a mass conspiracy trial, each defendant is entitled to have the proof submitted to the jury conform to the indictment so that he will adequately be appraised of the charges, so that he will

---

[35] J.A. 495a-496a, 499a, 501a-502a, 525a-528a, 537a, 539a-540a. *Cf. Jackson* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 260 (1966).

thereafter not run the risk of double jeopardy, and so that he will be free from oppressive prosecution.[36]

CONCLUSION

Each of the points discussed above requires a reversal of petitioner's conviction. But in addition, we ask the Court to view all of these points as part of a whole, for the Court has rightly pointed out that the mass conspiracy trial is fraught with dangers to the individual defendant. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). When as many errors as occurred here take place in the setting of a conspiracy trial, the individual defendant's rights are totally vitiated.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

ROBERT KASANOF
52 Broadway
New York, New York 10004

ALBERT J. KRIEGER
401 Broadway
New York, New York 10013

Counsel for Petitioner

---

[36] *Berger* v. *United States*, 295 U.S. 78 (1935); *United States* v. *Wills*, 36 F.2d 855 (3rd Cir. 1929); *Meyers* v. *United States*, 3 F.2d 379 (2d Cir. 1924); *Remus* v. *United States*, 291 Fed. 501 (6th Cir. 1923); *Grandi* v. *United States*, 262 Fed. 123 (6th Cir. 1920); *Harrison* v. *United States*, 200 Fed. 662 (6th Cir. 1912).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 240—September Term, 1965.

(Argued March 4, 1966 Decided July 8, 1966.)

Docket No. 30135

UNITED STATES OF AMERICA,

Appellee,

against

JOSEPH ARMONE, STEPHEN GRAMMAUTA,
VINCENT PACELLI, and NICHOLAS VISCARDI,

Appellants.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN, *Circuit Judge,* and FEINBERG, *Circuit Judge.**

Appeals by four appellants from judgments of conviction for violation of the federal narcotics laws, 21 U. S. C. §§ 173, 174, after a trial by jury before Dudley B. Bonsal, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

---

* Argument heard as District Judge, sitting by designation.

JEROME LEWIS of Brooklyn, N. Y., *for defendants-appellants Armone and Grammauta.*

E. BARRETT PRETTYMAN, JR. of Washington, D. C. (Robert Kasanof and Albert J. Krieger of New York, N. Y., on the brief), *for appellant Pacelli.*

EDMUND A. ROSNER of New York, N. Y. (Edward Cherney, on the brief), *for defendant-appellant Viscardi.*

ROBERT G. MORVILLO of New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Howard L. Jacobs, Otto G. Obermaier, John S. Allee, on the brief), *for appellee.*

FEINBERG, *Circuit Judge*:

Four defendants appeal from convictions of violating the conspiracy provision of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The single-count indictment named twenty-eight co-conspirators, twelve of whom were charged as defendants. The trial was originally scheduled to begin on April 27, 1965, with eight of the named defendants; the remaining four had not yet been apprehended. On that morning, two of the defendants became fugitives, requiring a one-week continuance. The trial of the other six defendants began on May 3, 1965 before Judge Bonsal and a jury.[1] On June 22, 1965, the jury convicted appellants Joseph Armone, Stephen Grammauta, Vincent Pacelli and Nicholas Viscardi, and acquitted Alfred Armone and Alexander Schoenfeld. On July 29, 1965, Judge Bonsal sentenced Joseph Armone to fifteen years, Grammauta to

[1] The six remaining defendants were severed.

eight years, Pacelli to eighteen years, and Viscardi to five years.[2] We affirm the convictions as to all four appellants.

Since the main arguments in this court are not directed to the sufficiency of the evidence, the facts developed at the seven-week trial will not be outlined in detail.[3] Viewing the government's case after a jury verdict of guilty in the light most favorable to the prosecution, as we must, it was, briefly, that appellants, together with the co-defendants and co-conspirators, conspired from 1956 through 1960 to import and distribute heroin in the United States. The drugs originated in France, and would be smuggled into this country with the aid of couriers, who usually travelled as part of their occupations. For example, Clarence Aspelund, a seaman, would transport heroin for exporter Marius Aranci in Marseilles, and Charles Bourbonnais, a flight purser, would bring in the drug for Felix Barnier in Paris. Mauricio Rosal, a Guatemalan ambassador, and Etienne Tarditti, a French businessman, also acted as couriers for Barnier.

The couriers initially delivered the drugs, once in this country, to Joseph Cahill, whose base of operations was New York City; eventually, Charles Hedges and Nicholas Calamaris took Cahill's role. Joseph Armone, one of the importers, would direct the eventual sale of the drugs to domestic wholesalers Vincent Pacelli and Michael Ricucci. Stephen Grammauta and Arnold Romano were also importers. Nicholas Viscardi acted as a storer of the narcotics pending delivery to wholesalers.

Many transactions were detailed at the trial. In 1956, Aspelund met Cahill in New York, and thereafter reported to his principal (Aranci) that Cahill had requested nar-

---

[2] Pacelli and Armone were also fined $20,000.

[3] Appellants do contend, in urging reversal, that the evidence disclosed multiple conspiracies, rather than a single conspiracy, and therefore they were not connected up with the alleged single conspiracy. This point will be discussed *infra*.

cotics. A six or eight kilo delivery, by way of Norfolk (because of complications in the New York harbor), was the fruit of this meeting. For the next three years Aspelund would bring in heroin for Cahill about three times a year. Bourbonnais would also bring in narcotics for Cahill, several kilos at a time; both couriers were paid by Cahill. Hedges, meanwhile, became a domestic deliverer for the latter, and was introduced to the conspirators' rendezvous at the Amvets Club; he was eventually promoted to direct dealings with the couriers.

Heroin from Pierre Roulet, an airline steward, would be taken by Hedges at first to Cahill's apartment, and later on to his own, where it would be picked up by Viscardi. Hedges would also deliver to various automobiles under the control of conspirators. In 1958, Hedges was introduced to Pacelli, and arrangements were made for deliveries directly to him by Hedges. In November 1958, Hedges made a delivery to Grammauta, who drove off with Viscardi.

On occasion, Hedges would meet with Joseph Armone at the Amvets Club to discuss some aspect of the dealings with the exporters' couriers. Payments from wholesalers were often turned over to Armone or Grammauta by Hedges, as the latter became involved in sales by the importers. Pacelli would sometimes furnish an automobile for Hedges's transportation. Hedges would pick up heroin at Viscardi's apartment, where it had been stored, for delivery to wholesalers, and he became a liaison between Armone and Pacelli. James Godwin, referred to in testimony quoted below in connection with the overt act problem, was Hedges's cousin; Godwin was often a witness to parts of the transactions involving Hedges and Pacelli.

During a lull in 1959-1960, Armone told Hedges that they would "get started" soon after a few things were "straightened out." Activity began again in February 1960, when Pacelli asked Hedges if he could obtain some heroin. Hedges relayed the request to Armone, who complained that

Pacelli was not paying in advance, or a high enough price. Armone eventually relented and the transaction was consummated. A few months later, Hedges demanded more money from Armone for himself; the latter authorized an extra $50. In the fall of 1960, certain couriers were arrested; Hedges was convicted in the District of Connecticut in March 1961.[4] Godwin saw Armone that month in an attempt to raise collateral for Hedges's appeal bond. Armone said that he had no money; a few months later Godwin pointed out that unless Hedges was given some help, as in raising bail, he might cooperate with the government. Armona said that another conspirator had gone to prison and "kept his mouth shut and Charlie could do the same." In September 1964, the indictment in the present case was filed, and Hedges became the prosecution's leading witness.

The four appellants make various contentions on appeal. Their arguments will be considered, under the name of the defendant primarily pressing the point. Those points raised by defendant Pacelli will be dealt with first; thereafter, to the extent that they have not already been covered, the arguments of Armone and Grammauta, made jointly, and Viscardi will be considered.

I. Pacelli

§ 174 Inference

Pacelli first argues that the trial judge's handling of the statutory inference set forth in 21 U. S. C. § 174 violated his rights under the Fifth and Sixth Amendments. The words of the statute are:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction un-

---

[4] *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

less the defendant explains the possession to the satisfaction of the jury.

This provision was held constitutional over forty years ago. *Yee Hem* v. *United States*, 268 U. S. 178 (1925); see *Orozco-Vasquez* v. *United States*, 344 F. 2d 827, 829 (9th Cir. 1965); *United States* v. *Sorenson*, 330 F. 2d 1018, 1021 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965). Referring to this section, Judge Bonsal told the jury that:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
>
> * * * *
>
> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that they have not offered an explanation as to their possession. You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally imported into the United States unless he has given you a satisfactory explanation of his possession.

Pacelli did not testify at the trial.[5] He first claims that this charge was an adverse comment on his failure to take the stand, depriving him of his Fifth Amendment rights not to be compelled to be a witness against himself and of

---

[5] Neither did appellant Armone.

due process. Pacelli also argues that the charge created a presumption against him because he did not take the stand and thereby violated 18 U. S. C. § 3481.[6] Appellant relies heavily on the recent Supreme Court decision in *United States* v. *Gainey*, 380 U. S. 63 (1965). That case dealt with a provision in the Internal Revenue Code, which the Court recognized as similar to section 174. *United States* v. *Gainey, supra* at 64-65 n. 2. The Code provides that the presence of a defendant at a site where the business of a distiller is being carried on unlawfully is sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury." Int. Rev. Code of 1954, § 5601(b)(2). In affirming the conviction of defendant Gainey, the Court upheld a charge similar to that given by Judge Bonsal and specifically rejected the contention that the charge could "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey, supra* at 70-71. Similarly, in *United States* v. *Secondino*, 347 F. 2d 725 (2d Cir.), cert. denied, 382 U. S. 931 (1965), this court, relying on *Gainey* reached a similar conclusion with respect to section 174. See also *United States* v. *Christmann*, 298 F. 2d 651, 652-53 (2d Cir. 1962) (dictum); *Williams* v. *United States*, 328 F. 2d 256, 262 (8th Cir.), cert. denied, 377 U. S. 969 (1964).

Pacelli seeks support not from the holding of *Gainey*, but from its advice that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." *Id.* at

---

[6] In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

71 n. 7. We agree that this would be the better practice and suggest it be followed in the future. But the holding of *Gainey* is that mention of the statute does not require reversal so long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71. Defendant counters that Judge Bonsal, unlike the trial judge in *Gainey,* failed in this command because he did not make it clear that a defendant was not required personally to testify and that the "explanation" could come from other evidence in the case. Pacelli urges with some force that the government's own request for charge would have told the jury that the explanation could have come from "the evidence in the case." However, Judge Bonsal did charge later in his instructions, after noting that certain defendants had testified, that:

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them or as any basis of any presumption or inference unfavorable to them. You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Somewhat earlier he had charged:

> Now, I mention these two defendants purely by way of example and for nothing else, because you will review the evidence and consider what reasonable inferences you find may be drawn therefrom with respect to each of the six defendants. As I said, it is for your determination what reasonable inferences may be drawn from the evidence. But I remind you again that after considering all of the evidence as to a particular

> defendant you find that two reasonable inferences may be drawn, one consistent with his innocence and one consistent with his guilt, you must acquit the defendant . . .

It would be hypertechnical, in the face of these instructions, to convert a general and accurate explanation of the section 174 permissible inference into a comment on defendants' failure to take the stand.[1] Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference."

Allegedly prejudicial publicity

Appellant Pacelli next contends that publicity destroyed his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), and, in federal trials, buttressed by the supervisory power, see *Marshall* v. *United States*, 360 U. S. 310 (1959). The errors specifically claimed are denials of motions for a change of venue, a continuance, a mistrial, and an examination of the persons responsible for the publications here involved.

Pacelli was indicted on September 30, 1964. On January 11, 1965, the front page of a New York City newspaper with a large circulation featured a photograph of a young woman in what apears to be lingerie, and the banner headline FEAR MOB SLEW DOPE BIG'S GIRL. Bold face type over

---

[1] In the portion of the charge dealing with the statutory inference, it would again be wiser practice to state also that the "explanation" can come from any evidence in the case and that the total evidence should be considered.

the caption asked Was She Killed To Seal Her Lips?[8] On page three appeared a banner headline and a sub-headline: Fear Dope Big's Girl Was Rubbed Out [and] Dancer Talked to Grand Jury and Promptly Vanished. There was another eye-catching picture of the young lady.[9] On

---

[8] The caption stated, in part:

Nancy Sue Shelton . . . is missing. Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with. Nancy disappeared three months ago . . . after testifying before a grand jury looking into dope smuggling. Her boyfriend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance. . . . Story on page 3

[9] The story said, in part:

But Nancy Sue hasn't been seen for more than three months now, and the feds believe she is dead. Murdered—because she knew too much.

• • • • •

She was Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic.

200 Million Dope Ring

Federal narcotics agents said that Pacelli was a member of a ring which smuggled more than $200 million worth of dope into the U. S. over a five-year period, even using Mauricio Rosal . . . as a courier. Rosal is doing a 15-year stretch.

On Sept. 23, agents had Pacelli under surveillance at Lexington Ave. and 73d St. when Nancy Sue drove up in a taxi.

Pacelli, 43, of 422 E. 118th St., paid her fare and helped her out of the cab. The couple strolled on 73d St. to Third Ave. There, the agents took Pacelli into custody on a narcotics charge.

• • • • •

[Nancy Sue failed to return before the Grand Jury to finish her testimony shortly thereafter, the story continues.]

The day after Nancy Sue testified the feds caught up with a longtime fugitive . . . a business associate of Pacelli.

The authorities said the underworld assumed Nancy Sue talked and that others might be nabbed if she talked some more.

• • • • •

If by remote chance you see her, let the government know. Your anonymity will be protected.

January 12, another article on the subject appeared in the same newspaper under a prominent headline (Dope Mob Ordered Nancy Sue to Scram) on page five. Both stories identified Pacelli as the missing girl's boy friend "who trafficked in narcotics."

Pacelli also points to a magazine article published approximately mid-way through the trial. The article appeared in a semi-scientific magazine addressed to laymen, with a national circulation of one and one-third million copies. Its contents are divided into departments, of which "Cars and Driving," "Home and Shop," and "TV, Radio and Electronics" are representational. In the June 1965 issue (apparently published about June 1), there appeared a six-page article, not referred to on the cover, but listed in the inside table of contents under "Special Reports." The article began mid-way through the issue, and was entitled "Our top anti-narcotics agent tells the inside story of how three nations combined to fight [the following in large type] The Dope-Smuggling Diplomats." The article is by-lined "by Henry L. Giordano as told to James C. G. Conniff." Mr. Giordano is identified under his photograph as Commissioner of the United States Bureau of Narcotics. The article describes the smashing of a narcotics smuggling ring which utilized diplomats as couriers, and is written in a popular, although unsensational, style. It identifies and has photographs of seven co-conspirators who were named in the indictment in the instant case, including one witness at the trial, and also names defendant Cahill (who was severed). The article did not mention any defendant tried below. On the day of publication, motions for a mistrial were made based on the article. The motions were denied, as was a later motion to vacate the verdict which was based in part on allegedly prejudicial publicity.

Since argument of this case, the Supreme Court has handed down its opinion in *Sheppard* v. *Maxwell*, —— U. S. —— (1966). In considering the question of preju-

dicial publicity here raised, we have carefully read the *Sheppard* case and take as our governing standard the following (*id.* at):

> Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

In *Sheppard,* the barrage of publicity reached carnival proportions, the jurors were "without adequate directions not to read or listen to anything concerning the case," there was no doubt that "this deluge of publicity reached at least some of the jury," "bedlam reigned at the courthouse," and the arrangements between the court and news media "caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.' " The Supreme Court stated that the basic reason for vacating the conviction was that the trial judge "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.* at .

None of these conditions can fairly be found in this case. There was no barrage of publicity. Complaint is made only of the publications described above. The two newspaper articles appeared on successive days in January, sixteen weeks before trial. Thereafter, until the June 1 magazine article, apparently nothing was written or said in the news media which would cause defendants to complain. A good part of this is undoubtedly due to the commendable foresight of the trial judge. A month before the trial, he asked the United States Attorney (with the concur-

rence of defense counsel) to request local news media not to publicize the trial. See *United States* v. *Bentvena*, 319 F. 2d 916, 934 (2d Cir.), cert. denied, 375 U. S. 940 (1963). The jurors were adequately and periodically warned not to read or listen to any accounts of the case in the media, and, in conducting the voir dire about the publications, the judge carefully walked the tightrope between exploring the jurors' knowledge and titillating their curiosity about material previously unknown to them.

Finally, we cannot fairly say, as the Court did in *Sheppard*, that there is no doubt that the publicity reached "at least some of the jury."[10] As to the magazine article published during the trial, the court below promptly inquired of the jury as follows:

> Before we adjourn for the day I would just like to tell you, you remember, I had been mentioning to you every day about any possible articles, radio or TV programs. My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have heard in the course of the trial. And since that has been brought to my attention, I would just like to ask each of you whether you have seen that article?
>
> Well, now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

We see no reason to disbelieve the jurors' negative response regarding an article which had just been published

---

[10] All jurors but one had read about the case in the newspapers or heard broadcasts about it. —— U. S. at ——.

in a magazine of somewhat limited appeal. As to the newspaper articles published before trial, at the beginning of the trial the court conducted a detailed voir dire which included the newspaper reading habits of the prospective jurors. The judge asked all members of the panel to advise him if they had read or heard anything about narcotics in general which would interfere with their ability to render a fair and impartial verdict, and if they had read anything in the press or heard anything relating to the defendants on trial, and received negative responses. Eight of the jurors finally selected were asked which newspapers they read; two said they read the newspaper involved, and one said he read "most of them." Each juror was asked whether he knew of any reason preventing him from rendering a fair verdict, with a negative response in all cases. No objection appears to have been taken after the voir dire regarding the failure specifically to ask four of the jurors which newspapers they read. The newspaper articles appeared some sixteen weeks before trial. We regard this time lag between publication and trial as most significant. As we recently had occasion to say:

> [T]he situation here is in no way comparable to that in *Marshall* v. *United States, supra,* where the Court reversed a conviction for unlawfully dispensing drugs where it was shown that seven jurors had been exposed to news articles which disclosed the defendant's prior criminal record and other information after the same material had been excluded from the trial by the trial judge. By direct contrast, the adverse publicity in the present case appeared several months prior to the trial and the importance of this time-lag cannot be overlooked. Both the Supreme Court and this court have indicated that the length of time between the publication of adverse publicity and the empanelling of the jury is a significant factor in assessing claims of prejudice resulting from pre-trial publicity. See *Beck* v. *Washington,* 369 U. S. 541, 556-558 (1961); *Stroble* v.

California, 343 U. S. 181 (1952) (six weeks); *United States ex rel. Brown* v. *Smith,* 306 F. 2d 596, 603 (2d Cir. 1962), *cert. denied,* 372 U. S. 959 (1963) (three months). Since the articles involved here were twelve weeks old at the time the jury was empanelled, it is highly unlikely that they were retained in the memories of the jurors. As Judge Weinfeld has pointed out, it is a fact that "frequently in this large metropolitan district prospective jurors show little recall of past widely publicized matters . . ." *United States* v. *Kahaner,* 204 F. Supp. 921, 924 (S. D. N. Y. 1962).

United States v. *Bowe,* —— F. 2d —— (2d Cir. 1966).

Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall* v. *United States,* 360 U. S. 310, 312 (1959). Under all of the circumstances of this case, including the time of the publicity, the steps taken by the trial judge to curb its effect on jurors, his careful exploration of its impact and the response of the jurors, we do not feel that the court below committed error. We do not believe a contrary result is required either by *Sheppard* or the cases cited in Pacelli's brief. We have already discussed the former; as to the latter, *Irvin* v. *Dowd,* 366 U. S. 717 (1961), involved a trial which "had become the *cause celebre*" of a small community. Eight of the twelve jurors selected thought petitioner was guilty in advance of trial. In *Marshall* v. *United States, supra,* several jurors read, during the trial, articles disclosing other crimes by petitioner. Here, of course, there is no evidence that jurors had read, much less remembered, the particular articles. *Estes* v. *Texas,* 381 U. S. 532 (1965), was another *cause celebre* involving a televised trial, and *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), involved a televised confession viewed by several

members of the jury. The other authorities cited to us are equally distinguishable.

Overt act 10

The next asserted error is the treatment of an overt act, number 10 in the indictment. We note at the outset of discussion of this issue that the narcotics statute here involved contains a conspiracy provision which, unlike the general conspiracy statute, 18 U. S. C. § 371, does not in terms require the doing of "any act to effect the object of the conspiracy." One district court has concluded that an overt act need not be proven under 21 U. S. C. § 174. *United States* v. *Gardner*, 202 F. Supp. 256 (N. D. Cal. 1962); *cf.* Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 948 (1959). As the government does not urge this ground, and as we believe the trial court committed no error in instructing the jury regarding the overt act, we do not think it necessary to explore this issue.

Of the eleven acts alleged in the indictment, only two were submitted to the jury; the trial judge held that the statute of limitations barred consideration of the other nine. The indictment alleged as overt act 10 that "in or about March of 1960," Joseph Armone was "in the vicinity of 122 Second Avenue, New York, New York." Thereafter, the government in a bill of particulars specified the act as taking place "during March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City." 207 Second Avenue was, of course, a different address from that specified in the indictment—122 Second Avenue.

At the trial, there was evidence that in April or May 1960, Hedges had a conversation with Armone in Lulu's Bar (conceded here to be located at 207 Second Avenue) during which Hedges complained about the amount of his payments. There was also testimony of a conversation between the same persons at the same place and some time

in the same months concerning a counterfeit $100 bill passed by Godwin, Hedges's cousin and one of the co-conspirators. Hedges testified that in Lulu's Bar Joseph Armone told him that a counterfeit $100 bill given "them" by Godwin would cause trouble in the form of an investigation. Godwin gave testimony corroborating this conversation.

During his charge, Judge Bonsal read the allegation of overt act 10 in the indictment and stated:

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges and Godwin concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

After some deliberation, the jury requested that the testimony relating to overt acts 10 and 11 be read to them. Thereafter, pursuant to agreement of the parties, the judge read to the jury in connection with act 10 the testimony of the conversation at Lulu's Bar concerning the counterfeit bill. As already noted, it is conceded here that Lulu's Bar is at 207 Second Avenue. The judge also again read the allegations of the indictment regarding act 10. It will be recalled that this referred to Armone's being in the vicinity of 122 Second Avenue. More deliberation followed, and then the following note came from the jury:

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to rehear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.

These two locations are five blocks (approximately) apart.

Can these [scratched out]

[over]

Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another, separate event?

Respectfully,

C. Burquist

The court thereupon told the jury that "everything you say here is exactly the truth" and that it was for them to determine whether 122 Second Avenue is in "the vicinity of" Lulu's Bar and the restaurant across the street. The jury was told to use its common sense. At no point did any defendant claim that the testimony concerning counterfeit money did not bear on overt act 10 or object on the ground that overt act 10 was in fact something different. In fact, as indicated above, defense counsel cooperated in selecting the testimony to be read to the jury.

A few weeks after the verdict, the trial judge summoned counsel to tell them he had learned that there had been no testimony relating to the conversation about the counterfeit bill before the Grand Jury. The judge believed that the Grand Jury in alleging overt act 10 had apparently intended the conversation in which Hedges asked for higher payments (that conversation also took place at Lulu's Bar at 207 Second Avenue). The judge thought it was "a mistake in which we all participated."

From this relatively simple set of circumstances and a trial judge's effort to bend over backwards to be fair, defendants have spawned a bewildering array of contentions, some of them inconsistent with each other. Pacelli's will be considered first. He first argues that the jurors' note

meant to ask whether the "vicinity" of 122 Second Avenue can be said to include 122 Second Avenue itself. His theory is that the jury, having heard still other evidence concerning events at that address,[11] and not knowing of the bill of particulars specifying 207 Second Avenue, thought that perhaps 122 Second Avenue could not be deemed (in law) to be in the vicinity of itself, and wanted to know. If this interpretation is correct, Pacilli continues, the judge's response could only be confusing because it focussed on a conversation at 207 Second Avenue. We think that this interpretation of the jury note—which was never raised below—does not rise to the level of "strained." The note explicitly refers to "two locations," including Lulu's Bar (which is at 207 Second Avenue), and their distance apart, and asks whether 122 can be thought of as "the vicinity," or whether it is the location of a different event. The note could only be interpreted reasonably as asking for the definition of "vicinity" vis-a-vis the two locations. If anything, by eliminating the possibility raised by Pacelli that the jury might tie up overt act 10 to other testimony of events at 122 Second Avenue, the trial judge helped, rather than harmed, defendants. Appellant argues that the possibility of confusion remained, thereby vitiating the verdict. However, the jury's note makes clear that it was following the testimony closely and was focussing sharply on the limited issue the trial judge had left with it.

Pacelli also claims he was deprived of a unanimous verdict because jurors might agree that act 10 was proven for different reasons; *i.e.*, some might consider events at 122 Second Avenue, while others might find the conversation at 207 Second Avenue occurred. Armone and Grammauta similarly argue that the court refused to charge that the jury had to agree unanimously on one or the other of

---

[11] There was testimony, not referred to above, that the Amvets Club at 122 Second Avenue was the scene of many events referred to in the evidence.

the overt acts submitted to it, and not merely agree that an overt act had been proven. Whether this fragmentation of the unanimity requirement is impermissible need not be explored. As for Pacelli's claim, the judge's reply to the note in effect eliminated this possibility from the case. As for Armone and Grammauta's argument, the court's charge that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 and 11, in fact, took place . . . Now, if you find beyond a reasonable doubt that at least one of these two overt acts, 10 and 11, was committed," coupled with his instruction that the verdict be unanimous, adequately answers this objection. "You" and "your" obviously refer to the jury as a body; any supposition that the jurors would take the instructions to mean that they can fragment their findings on the elements of the offense (taking overt acts *arguendo* to be "elements" in this context) is strained conjecture.

Accepting the correct interpretation of the jury note *arguendo,* Pacilli next contends that there was no evidence of the distance between 122 and 207 Second Avenue, and the subject was not one that the jury could notice; hence, the jury either guessed at the distance or took a view, both of which courses are impermissible. Therefore, there was no way the jury could decide vicinity *vel non,* and the issue as to act 10 should not have gone to the trier of fact. This argument was again not made to the trial judge at any time and for that reason, among others, cannot prevail here. In fact, appellants did not object to the court's endorsement of the jury's supposition as to the distance between the two places by telling it "everything you say here is exactly the truth."[12] In addition, there was sufficient evidence from which the jury could approximate the dis-

[12] Appellants did urge the judge to take the entire issue from the jury as a matter of law.

tance between the Amvets Club and Lulu's Bar as five blocks.[13]

The other appellants apparently argue that as a matter of law 207 and 122 Second Avenue could not be in the same "vicinity" and therefore the issue should not have been submitted to the jury. This position is incorrect. Moreover, any error committed by the trial judge did not harm defendants. The sequence of events shows that there was here nothing more than an immaterial variance between the indictment and the proof—the indictment charging 122 Second Avenue and the proof showing 207 Second Avenue —and appellants were aware of the variance over six weeks before the trial began. See *United States* v. *Ansani*, 240 F. 2d 216, 223 (7th Cir.), cert. denied, 353 U. S. 936 (1957)

---

[13] Despite the statement in Appellant Pacelli's Brief, p. 67, that "a search of the transcript reveals that *no testimony was presented from which the jurors might infer the distance between these two addresses*" (emphasis in original), there is at least the following in the record: Hedges testified that the address of the Amvets Club was 122 Second Avenue. Joint Appendix ("JA"), pp. 84a, 90a, 94a, 156a. He also testified that Lulu's Bar was at 13 Street and Second Avenue. *Id.* at 157a. Godwin testified that the bar was on 12 Street and Second Avenue. *Id.* at 220a. Sol Gold testified that he lived "at Second Avenue and 4th Street, 65." Record, p. 3600. Aspelund testified that the Phoenix Bar was on Second Avenue, between 12 and 14 Streets, JA, p. 197a, and on cross-examination stated it was between 10 and 12 Streets. Record, p. 1812. When asked "you gave the address [of the Phoenix Bar] 180 Second Avenue," Aspelund replied "I got it in France" (although he later professed not to have paid attention to the address at the time in question). *Id.* at 1812-18.

Knowing that 65 Second Avenue was at 4 Street and that 180 Second Avenue was between 10 and 14 Streets, the jury could reason that, in the area of Second Avenue in question, there were about 10 or 20 house numbers per block. This would locate the Amvets Club between about 6 and 12 Streets, or up to seven blocks from Lulu's Bar. Depending on what testimony as to various addresses was believed, the jury could easily have placed the distance between the club and the bar at "five blocks (approximately)," which is what it did.

(variance between Chicago and Cicero, Illinois, held immaterial); *Strauss* v. *United States,* 311 F. 2d 926, 932 (5th Cir.), cert. denied, 373 U. S. 910 (1963); *United States* v. *Glaze,* 313 F. 2d 757 (2d Cir. 1963). Therefore, the judge could have instructed the jury that the proof of act 10 did not specifically conform to the charge in the indictment but that the variance was immaterial. He could have gone on to say that if the jury believed that the conversation about the counterfeit bill took place at 207 Second Avenue in March or April of 1960, the prosecution had fulfilled its burden as to act 10.[14] Therefore, the judge created an additional issue of fact in his instruction that the jury consider whether 122 and 207 Second Avenue were in the same vicinity, and any error was not only harmless, but was beneficial to appellants. Pacelli also argues that the jury should have been instructed that different non-adjacent addresses are not in the "vicinity" of each other. "Vicinity" has been defined as "a surrounding area or district." Webster's Third New International Dictionary 2550 (1961). No one seriously contends that the jury had an erroneous idea of the approximate distances involved. Its note asserted that the distance was "five blocks (approximately)" and even appellant Pacelli's brief says no more than it is "closer to six blocks apart and on opposite sides of the street."

Appellants have three further major thrusts based on overt act 10: (1) the absence of any Grand Jury testimony about the counterfeit bill conversation was fatal error; (2) the conversation, in any event, was not an act in furtherance of the conspiracy; and (3) reception of the evidence violated the "other crimes" rule.

The first point is based on the premise that the failure of the Grand Jury to consider what developed at the trial as act 10 precludes consideration of the act by the petit

---

[14] Subject, of course, to the requirement that the act be in furtherance of the conspiracy, discussed *infra.*

jury. In *United States* v. *Negro,* 164 F. 2d 168 (2d Cir. 1947), appellants were convicted for a narcotics conspiracy. There was no evidence of the only overt act alleged in the indictment, but the government argued that another overt act had been proved. This court reversed for lack of evidence of the overt act alleged in the indictment because the trial judge had instructed the jury only as to this act and had not instructed the jury as to the proven (but unalleged) act. To avoid a problem at the impending retrial, the court considered the question of proving unalleged acts (*id.* at 173):

> We believe that, at least for some purposes, the overt act is not part of the crime. . . . Thus if, in the instant case, there had been no proof of any overt act other than that alleged, and if the defendant Bruchon had been acquitted, we think that, under the doctrine of double jeopardy, he could not subsequently have been convicted for a conspiracy on the same facts with the single exception that, in the second trial, a different overt act was alleged and proved. We think, also, that an overt act is not part of the crime in the sense that the act alleged must be proved, where another unalleged overt act is proved. . . .
>
> Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, such a variance justifies a request for continuance because of surprise.

Appellant Pacelli asks this court to disavow this dictum. Contrariwise, appellants Armone, Grammauta and Viscardi argue that the *Negro* case requires reversal here. The latter contention is clearly erroneous since, under *Negro,* a conviction may rest on an overt act not charged in the indictment. As to Pacelli's frontal attack on *Negro,* the rule of that case has also been accepted by three other courts of appeals, *Napolitano* v. *United States,* 340 F. 2d 313, 314 (1st Cir. 1965); *Culp* v. *United States,* 131 F.

2d 93, 100 (8th Cir. 1942); *Worthington* v. *United States*, 1 F. 2d 154, 155 (7th Cir.), cert. denied, 266 U. S. 626 (1924), although there is authority to the contrary, *Fredericks* v. *United States*, 292 Fed. 856 (9th Cir. 1923), and we see no reason not to adhere to the rule in this circuit.[15] Moreover, the essence of the charge against appellants is a criminal agreement. A principal reason for the overt act requirement in a conspiracy prosecution "is simply to manifest 'that the conspiracy is at work,' *Carlson* v. *United States*, 187 F. 2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates* v. *United States*, 354 U. S. 298, 334 (1957).[16] Where, as here, the unalleged overt act dealing with the counterfeit bill was inadvertently substituted for the alleged overt act dealing with conversation about commissions, defense counsel joined in focussing the jury's attention on testimony as to the former, no objection was made to the trial judge raising this issue, a fortiori no continuance was sought, and there was ample testimony as to the overt act referred to by the trial judge, reversal for the reasons urged by appellants is unwarranted.

As to the second contention, an overt act is an act "committed in pursuance of the agreement." *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants seem to argue that conversation cannot be an "act," and that, in any event, this conversation was not in furtherance of the conspiracy. However, much talk is "action" with direct legal consequences; *e.g.*, people "decide," "promise," and "reject." *Cf.* decisions holding telephone conversations to be overt

---

[15] For favorable law review comment on the rule, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 992-93 (1959).

[16] See Developments, *supra* note 15, at 945-49 (other rationales for overt act requirement).

acts, *Singer* v. *United States*, 208 F. 2d 477, 480 (6th Cir. 1953); *Bartoli* v. *United States*, 192 F. 2d 130, 132 (4th Cir. 1951); *Smith* v. *United States*, 92 F. 2d 460, 461 (9th Cir. 1937). Here we have a warning to co-conspirator Hedges by defendant Armone, after the conspirators had gone to the trouble of tracing the source of the counterfeit bill. We hold that this conversation qualified as an "act." Moreover, the jury could find that Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators. The trial court left the issue of furtherance to the jury. We cannot say as a matter of law that the jury could not reasonably have concluded that this conversation, viewed in the context of the other evidence, was in furtherance of the conspiracy. Reliance on *Grunewald* v. *United States*, 353 U. S. 391 (1957), is misplaced, for there the Court stated (*id.* at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the present case, the objectives of the conspiracy—importation and distribution of narcotics—had not been completed at the time of the conversation. And we cannot say that the successful accomplishment of the crime did not necessitate concealment. Cf. *Mount* v. *United States*, 333 F. 2d 39, 44 (5th Cir.), cert. denied, 379 U. S. 900 (1964); *Atkins* v. *United States*, 307 F. 2d 937, 940 (9th Cir. 1962).

Finally, Armone and Grammauta argue that the reception of evidence pertaining to the counterfeit bill, and evidence relating to what may have been a different counterfeit bill (won in a dice game by Armone's nephew

and given to Armone's sister-in-law), violated the rule excluding proof of other crimes. But Armone himself was not shown to have passed or received counterfeit money knowingly and voluntarily; moreover, his relatives were not shown to have been knowingly connected with the counterfeit money either. This argument is without merit.

II. Armone and Grammauta

Hedges's testimony

Defendants Joseph Armone and Stephen Grammauta raise nine separate grounds, in addition to those already discussed, for reversing the jury verdict. Four of them have to do, in whole or in part, with the testimony of Charles Hedges, the chief witness for the prosecution. Thus, these appellants attack the adequacy of the trial court's instruction under *United States* v. *De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), which held that in certain circumstances prior sworn testimony of a witness could be admitted as substantive evidence, rather than for impeachment only. Hedges had previously been prosecuted in Connecticut, see *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963), and had given testimony contrary to his testimony in this trial. The court below charged that the jury could consider the prior testimony in weighing credibility, and could also consider it as affirmative evidence in this trial. An objection below to the instruction (apparently not made by these two appellants) related to the possibility that both the earlier and current testimony could be false. The trial court thereupon charged:

> Secondly, you remember I talked about Hedges' testimony at the Connecticut trial and I told you it is for you to judge on which occasion he was telling the truth. But, of course, it is equally within your province to find he was testifying falsely on both occasions. You can do that. You can find that or you can deter-

> mine on which occasion he was telling the truth and in which part of his testimony he was telling the truth.

These instructions were clear and correct.

Armone and Grammauta next claim that cross-examination of Hedges was unduly limited. We have examined the specific instances cited and find no abuse of discretion in the limitation of this five and one-half day cross-examination. These appellants next contend that the federal rule allowing conviction on uncorroborated testimony of accomplices is not one of unvarying application, that it is the "better practice" to require corroboration and that the circumstances of this case call for the better practice. But a short time ago, this court stated:

> We cannot understand why they insist that the testimony of accomplices must be corroborated. The federal rule is clearly to the contrary. [Citations.]

United States v. *Kelly*, 349 F. 2d 720, 767 (2d Cir. 1965). Appellants also suggest we hold the accomplice testimony in this case incredible as a matter of law. The argument is completely without merit. *United States* v. *Aviles*, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U. S. 974, 982 (1960).

Denial of continuance to Armone

Appellant Armone next contends that the court erroneously denied his motions for severance on account of illness during the trial. Armone had been shot in the chest some sixteen months before the trial started, but, according to his brief, still suffered at trial from a "pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition." Trial commenced on May 3, 1965, and the first mention thereafter of Ar-

mone's condition to the court was on May 19, when the trial judge, after being informed of a jury tampering incident, remanded all defendants. Thereafter, the judge allowed Armone to be treated by his personal physician on two occasions. On Tuesday, June 8, the trial was adjourned so that Armone could be taken to the hospital where he was examined by a government physician. The following day counsel moved for a severance, but a few hours of trial were held in the afternoon. The court stated that it would observe defendant. On June 10, the court was informed that Armone was being detained in the hospital, and two adjournments followed until Monday, June 14. That day and the next, counsel again objected to proceeding with trial, but the trial continued. Both sides rested on Tuesday, June 15, and after another day's adjournment final arguments started on Thursday, June 17. On the afternoon of June 15, the court took testimony from Armone and two physicians on the issue of competence to stand trial; the court also heard defendant again and another doctor on June 17, and a fourth doctor on July 9, the latter date falling after conclusion of the trial.[17]

The determination of competence to stand trial is, of course, basically a question of fact and, as with appellate review of most factual issues, the higher court bows to the lower court unless an abuse of discretion is manifest. *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965); *United States* v. *Shotwell Mfg. Co.*, 287 F. 2d 667, 672 (7th Cir. 1961), aff'd on other grounds, 371 U. S. 341 (1963); *Stein* v. *United States*, 263 F. 2d 579, 581-82 (9th Cir. 1959); *United*

[17] Since the judge had denied the motions before the trial ended, we have considered the record as it was before him then. It should be noted, however, that not infrequently competence to stand trial is determined after the fact or *nunc pro tunc*. E.g., *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965) (*per curiam*); *Johnston* v. *United States*, 292 F. 2d 51 (10th Cir.), cert. denied, 368 U. S. 906 (1961); *Wells* v. *United States*, 239 F. 2d 931 (D. C. Cir. 1956) (*per curiam*); see 18 U. S. C. § 4245.

States v. *Alker*, 260 F. 2d 135, 157 (3d Cir. 1958), cert. denied, 359 U. S. 906 (1959). Here at most there was a conflict of testimony, which the trial judge was in the better position to resolve. Despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence to stand trial during the period under attack. In the light of this evidence and the trial judge's grant of adjournments, we cannot say that he was clearly in error and abused his discretion.

Alleged other crimes testimony and guilt by association

Appellants Armone and Grammauta also claim that they were denied a fair trial by proof of other crimes or a propensity to commit them. Beside the counterfeit bill incidents, dealt with *supra*, they point to two answers given by Hedges on cross-examination. In one, responding to a question about an offer of a job, Hedges said that Joseph Cahill (a severed defendant) proposed that Hedges rob a bookmaker for "some defendants." The judge promptly instructed the jury to disregard this answer. The other answer came about as follows:

> Q. Did you testify at the Connecticut trial that you went down and brought Mr. Aspelund into the hotel?
> A. If I did your defendants would be up there—

After immediate objection the question was rephrased and a different answer given. We think that these two brief, isolated outbursts, at most ambiguous, unavoidable when dealing with witnesses of Hedge's admitted background, coming out on cross-examination by the defense, and with no prosecutorial intent to improperly prejudice defendants, were patently harmless when considered in conjunction with the curative steps taken.

In the same vein, appellants also claim that admission into evidence of a nightclub photograph showing some defendants seated together and a telephone number book

containing the names of several defendants was reversible error because they improperly created an impression of guilt by association. However, the prosecutor's summation included the following:

> The government is not trying to prove guilt by association, but isn't it some evidence of the conspiracy, that these people knew each other and that these people went out with each other?
>
> • • • • •
>
> Once again, ladies and gentlemen, I am not talking about guilt by association, I am just talking about these people knowing each other and associating with other as some evidence.

At this point, the court told the jury "you can't find guilt by association" and that it had to "consider all the evidence as to the association." Thereafter, in his charge, the judge also said:

> Now, of course, you should not infer membership in a conspiracy merely because of family relationship, merely because some of the defendants may have had their pictures taken together, merely because of friendship between alleged co-conspirators. Of course, you can't find any defendant guilty merely by association.

Since agreement is an element of conspiracy, evidence of association is relevant. The judge properly charged the jury on how to handle the issue.

Since the photograph and telephone-and-address book had been seized incident to or after the arrest of co-defendant Cahill, appellants also claim that they were admissions of a co-conspirator made after his arrest and hence were inadmissible against them. But the evidence involved here was not offered under the admission exception to the hearsay rule to assert the truth of matter contained in an out-of-court statement. A photograph is

not an out-of-court statement at all; both items of evidence, moreover, were in existence before the end of the conspiracy. A similar objection to the admission of ten to twelve kilos of heroin is also without merit.

Single or multiple conspiracies

Armone and Grammauta next contend that the evidence showed multiple conspiracies and thus prejudicially varied from the single conspiracy charged in the indictment; implicit in this argument is an alleged insufficiency of evidence linking them to a single conspiracy. They also assert that, in any event, the instructions were not adequate and the verdict was mistaken on this point. Arguing variance, appellants rely essentially on facts disclosed in *United States* v. *Cianchetti, supra,* in which Hedges was a defendant and, it is claimed, the present defendants were not mentioned at trial. But in trial 1 there can be a conspiracy with several defendants, and in trial 2 there can be a different conspiracy with some of the same defendants or co-conspirators, or even the same conspiracy with other, different defendants being tried for the first time, all without fatal multiplicity in any case. The judge's charge adequately distinguished between a single conspiracy and multiple conspiracies. As to any supposed insufficiency of evidence, the spare summary of the record *supra* (pp. 2537-2539) shows clear support for the jury's verdict. In any event, there is no indication that any variance rose to sufficient dimensions to be prejudicial. *United States* v. *Agueci,* 310 F. 2d 817, 827 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants claim that the court should have guided the jury by marshalling the facts, and should have told the jurors that Armone had to be connected with activities prior to entry of new sources of supply of narcotics, or those activities must be disregarded in determining his guilt. No exception was taken by counsel to the charge on these two grounds, and we do not find "plain error" under Fed. R. Crim. P. 52(b). *Com-*

pare United States v. *Kahaner*, 317 F. 2d 459, 479-80 n. 12 (2d Cir.), cert. denied, 375 U. S. 835, 836 (1963), *with United States* v. *Kelly*, 349 F. 2d 720, 757 (2d Cir. 1965).

Missing witness instruction

Finally, these appellants assign as error the court's missing witness instruction concerning one Andy Dillon. The court said:

> You recall that Godwin testified that he received a counterfeit $100 bill and said that it came from one Andy Dillon. Said Andy Dillon was not called to testify by either the government or the defendants, although I am informed that he was in the courtroom during the course of the trial.
>
> Mr. Dillon could have been called by either side as a witness so that from the failure of either side to call him, you may infer that his testimony might have been unfavorable to either the government or to the defendants. But it is equally within your discretion to draw no inference at all from the failure of the government or of the defendants to call Dillon as a witness.

Appellants point out that Dillon was associated by the evidence with Armone, that the government refused to stipulate and the court refused to allow counsel to tell the jury that Dillon had been subpoenaed by the government, and that the instruction included mention of the fact that Dillon was sitting in the courtroom during the trial (a fact brought to the court's attention by defense counsel). Counsel, after the charge, requested that the jury be told the government had subpoenaed Dillon and that it should disregard any portion of the charge insofar as it allowed the drawing of an inference against defendants.

The instruction given by Judge Bonsal was a correct statement of the law, and may be given in the absence of a request. *United States* v. *Llamas*, 280 F. 2d 392, 393

(2d Cir. 1960). The reference to Dillon's presence, while unnecessary, could not be prejudicial, since it merely indicated the foundation for the instruction. If the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented. In any event, no argument is made that Dillon was not in the courtroom. That the government may have been responsible for Dillon's presence is irrelevant. Appellants are in reality attacking the essence of the missing witness charge, *i.e.*, that the jury can draw an unfavorable inference from failure to put a witness on the stand; a defendant does not have the privilege of keeping the missing witness charge from the jury. Even if the government had not subpoenaed Dillon, the charge could have been given present some showing that he was available, if the other conditions for the charge were fulfilled. Hence, that the government subpoenaed Dillon is irrelevant. Since Dillon was undisputably available for each side, the charge was not erroneous. *United States* v. *Comulada*, 340 F. 2d 449, 452 (2d Cir.), cert. denied, 380 U. S. 978 (1965); *United States* v. *D'Angiolillo*, 340 F. 2d 453, 457 n. 5 (2d Cir.), cert. denied, 380 U. S. 955 (1965); cf. *United States* v. *Bergman*, 354 F. 2d 931, 935 (2d Cir. 1966) (witness equally unavailable to both; no inference should be drawn).

III. Viscardi

Statute of limitations

In addition to joining in contentions already discussed, appellant Viscardi raises two arguments applicable only to him. First, he attacks the court's charge on the statute of limitations. He argues that the evidence showed that before September 30, 1959 (the earliest date not barred by the statute), he took narcotics from Hedges, and after that time he delivered them to Hedges, and, therefore, the court should have instructed the jury to find "exactly which conspiratorial agreement he had entered into, and that such agreement continued past September 30, 1959." The

short answer is that a shift in role, as appellant terms it, would not affect the statute of limitations. The conspiracy's vital elements (members and purposes) remained the same after September 1959, and we cannot say that a different job—at least one with as little difference as that involved here—would entail a different conspiracy vis-a-vis the conspirator involved. *United States* v. *Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), cert. denied, 379 U. S. 960 (1965), is not in point; that case dealt with the shifting objectives of the conspiracy. Viscardi was not tried for making a delivery to or receiving narcotics from Hedges; the charge was conspiring to effectuate much more generalized objectives, and whether he was a deliverer or recipient on any particular occasion would not be determinative of what he had conspired to achieve. It is, therefore, unnecessary to deal with the government's contention that Viscardi's function as "plant man" never did change.

Multiple representation

Viscardi also claims that he was prejudiced by sharing counsel with the two Armones and Grammauta and that the trial court's failure to apprise him of "the hazards inherent in sharing an attorney with the Armones and Grammauta" was error. The short answer to Viscardi's contention is that almost six months prior to trial, the government requested the court to inquire into the existence of a possible conflict of interest. The following interchange between government counsel and counsel for Viscardi, the two Armones, and Grammauta appears on the record:

> Mr. Jacobs: . . . [Y]our Honor, this case was on on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the

Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.

The Court: I assume he doesn't or he would have brought it to the attention of the Court.

Mr. Lewis: That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

Viscardi relies upon *Glasser* v. *United States*, 315 U. S. 60 (1942), and *Campbell* v. *United States*, 352 F. 2d 359 (D. C. Cir. 1965). Nothing in *Glasser* requires the government or the court to take further steps after receiving such an assurance from an officer of the court. In *Campbell*, where a single attorney was retained by two defendants, the court reversed the convictions because the trial judge did not inquire into whether the defendants knowingly accepted the risk of sharing defense counsel. We need not now decide how much of the *Campbell* case we accept as law in this circuit. We simply hold that the trial judge's inquiry of counsel as to possible conflict of interest in this case sufficed to protect any rights Viscardi may have had in the matter. The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances. Viscardi argues that his counsel might have devoted more time to him in final argument. Viscardi also points out that he had no previous criminal record, that he was the only defendant to produce a character witness, and that the trial judge received many letters in his behalf recommending leniency in sentence. He contends that his counsel might have suggested that additional character witnesses should testify during the trial, had it not been for the fact that this would have reflected adversely upon Armone and Grammauta, who presented no character witnesses. However, these are not weighty arguments. We can take judicial notice of the fact that many who would touch pen to

paper will not stand up to be counted in person under oath and in court. Also, brushing off a co-defendant in summation can be effective strategy.[18] Cf. *United States* v. *Burkeen*, 355 F. 2d 241 (6th Cir. 1966).

We have considered all contentions made by appellants. Having found no reversible error, we affirm the convictions.

Judgments affirmed.

---

[18] It should be noted that defendant Alfred Armone, who was represented by the same counsel and received approximately as much attention in counsel's closing remarks as defendant Viscardi, was acquitted.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, Chief Judge
HON. IRVING R. KAUFMAN,
HON. WILFRED FEINBERG, Circuit Judges

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ALFRED ARMONE ET AL., *Defendants,*

JOSEPH ARMONE, STEPHEN GRAMMAUTA, VINCENT PACELLI, NICHOLAS VISCARDI, *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

FINAL ★★★★★

DAILY NEWS

NEW YORK'S PICTURE NEWSPAPER®

7¢

Vol. 46. No. 171 Copr. 1965 News Syndicate Co., Inc. New York, N.Y. 10017, Monday, January 11, 1965★ WEATHER: Sunny, breezy and cold.

FEAR MOB SLEW DOPE BIG'S GIRL

Story on Page 3

60,000 Dockers on Strike

Story on Page 2

Was She Killed To Seal Her Lips?

Nancy Sue Shelton, 25-year-old blue-eyed, red-haired beauty who loved the bright lights and high living, is missing. Federal authorities fear she may have been murdered because she knew too much — too much about some of the unsavory characters she was known to have associated with. Nancy disappeared three months ago from her East 63d St. luxury flat after testifying before a grand jury looking into dope smuggling. Her boyfriend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance. Federal agents found records in her safe deposit box in a Madison Ave. bank showing deposits of $28,296 listed in a Las Vegas bank plus diamonds and $1,836 in cash.

Story on page 3

APPENDIX B 38a

'Fear Dope Big's Girl Was Rubbed Out

Dancer Talked to Grand Jury And Promptly Vanished

By NORMA ABRAMS and SIDNEY KLINE

Nancy Sue Shelton, 25, blue-eyed, red haired, a lithe 5-foot-7 packaged in 112 trim pounds, was a knockout. Men found it hard to keep their eyes off her. But Nancy Sue hasn't been seen for more than three months now, and the feds believe she is dead. Murdered—because she knew too much.

A dancer, showgirl, an expert ice skater, a good enough actress to do bit parts on TV and off-Broadway, Nancy Sue loved the bright lights and high living. She found them because she wasn't choosy about her associates.

She was Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic.

Mauricio Rosal

Big John Ormento

Both behind bars

200 Million Dope Ring

Federal narcotics agents said that Pacelli was a member of a ring which smuggled more than $200 million worth of dope into the U. S. over a five-year period, even using Mauricio Rosal, a onetime Guatemalan ambassador to the Netherlands, as a courier. Rosal is doing a 15-year stretch.

On Sept. 23, agents had Pacelli under surveillance at Lexington Ave. and 73d St. when Nancy Sue drove up in a taxi.

Pacelli, 43, of 422 E. 118th St., paid her fare and helped her out of the cab. The couple strolled on 73d St. to Third Ave. There, the agents took Pacelli into custody on a narcotics charge.

Testified Before Jurors

Nancy Sue was permitted to return to her luxury apartment at 450 E. 63d St. but was ordered to report to the U. S. Court House in Foley Square the next morning. She did. She testified before a grand jury. She talked to an assistant U. S. attorney. She was instructed to return.

She didn't—and authorities believe it was because she couldn't.

The day after Nancy Sue testified the feds caught up with a longtime fugitive, Michael Ricucci, 44, of 325 Pleasant Ave., a business associate of Pacelli.

The authorities said the underworld assumed Nancy Sue talked and that others might be nabbed if she talked some more.

The Last to See Her

As far as agents, in an international hunt, have been able to determine. Mrs. Yolande Angolet, whose husband is doing 10 to 20-years for narcotics violations, was the last to see Nancy Sue.

Yolande and Nancy Sue were friends. On the Sunday after Pacelli's arrest, Yolande dropped in on Nancy Sue. They chatted. Then Nancy Sue left for an appointment. After that no one saw Nancy Sue.

With a court order, federal agents searched Nancy Sue's apartment and, later, her safe deposit box in a bank branch. What they found reflected what a mobster's girl can have—as long as she's around to have it.

Furs and Diamonds

In the apartment, adorned with custom-made French Provincial furniture, were a ranch mink coat, a leopard-skin coat, closets filled with expensive clothing and a well-stocked bar.

In the safe deposit box were a diamond-set wrist watch, a diamond bracelet, two heart-shaped diamond pins, a diamond ring, diamond and pearl earrings, $1,836 in cash and records of $28,296 on deposit in a Las Vegas bank.

A girl going away voluntarily wouldn't have left all that behind, the authorities pointed out.

They established that Nancy Sue was born in Kansas City on Nov. 22, 1939, and grew up in Southern California. She went to school in West Los Angeles, studied drama, got into show business, worked the strip in Vegas, wangled parts in Hollywood and New York.

Nancy Sue Shelton—did she know too much?

She Met Him in Vegas

It was in Las Vegas that Nancy Sue met Pacelli and became his girl. After that, work wasn't necessary, but she still liked to dance.

Her friends were the wheels in the narcotics traffic. Some like Big John Ormento, are behind bars for long terms. Some, like Andy Alberti, who shot himself to death in November in his Riverdale home, are gone.

But some are still walking around, ruining lives with their dope operations.

So Nancy Sue doesn't make the scene these days. Look at her picture. If by remote chance you see her, let the government know. Your anonymity will be protected.

(Other picture on page 1)

Dope Mob Ordered Nancy Sue to Scram

By FRANK FASO and SIDNEY KLINE

Glamorous redhaired Nancy Sue Shelton, 25, girl friend of notorious dope smuggler Vince Pacelli, was ordered to drop out of sight after Pacelli was arrested in September and she was called before a federal grand jury, THE NEWS was advised yesterday.

Before obeying orders, the one-time showgirl drew nearly $10,000 from a safety deposit box to finance flight, informants said.

Whether she later was killed, as federal authorities feared, or whether she remained alive and in hiding was an open question.

"She Got Out"

"She," one acquaintance said, "was not the kind of a girl who could stand up against a prosecutor and grand jury. The mob was sure she would have talked, and she was told to get out. She got out."

Nancy Sue got out in such a hurry that she left behind, in the safety deposit box, $1,836 in cash, thousands of dollars worth of jewelry and records showing that she had $28,296 on deposit in a Las Vegas bank.

Also left behind, in her luxury apartment at 450 E. 63d St., was a fortune in furniture and furnishings and an expensive wardrobe which included many furs.

Neither city nor federal authorities would comment yesterday on Nancy Sue other than to say that they wanted to question her. But this much was known:

Nancy Sue became Pacelli's girl friend in Las Vegas and came with him to New York, where he was active in a mob which imported $200 million in dope into the U.S. in five years.

Mob Got to Her

Pacelli was arrested Sept. 23. Nancy Sue, with him at the time, was not taken into custody but was ordered to appear before a federal grand jury the next day.

She talked a little and was told to return. The mob got to her before a second appearance took place.

Nancy Sue's mother, Mrs. Millicent Glover of Honolulu, came to New York to visit the girl early in October. The daughter was gone. She had vanished Sept. 27.

On Oct. 3, Mrs. Glover reported Nancy Sue missing to the E. 67th St. station police. A missing persons alarm went out.

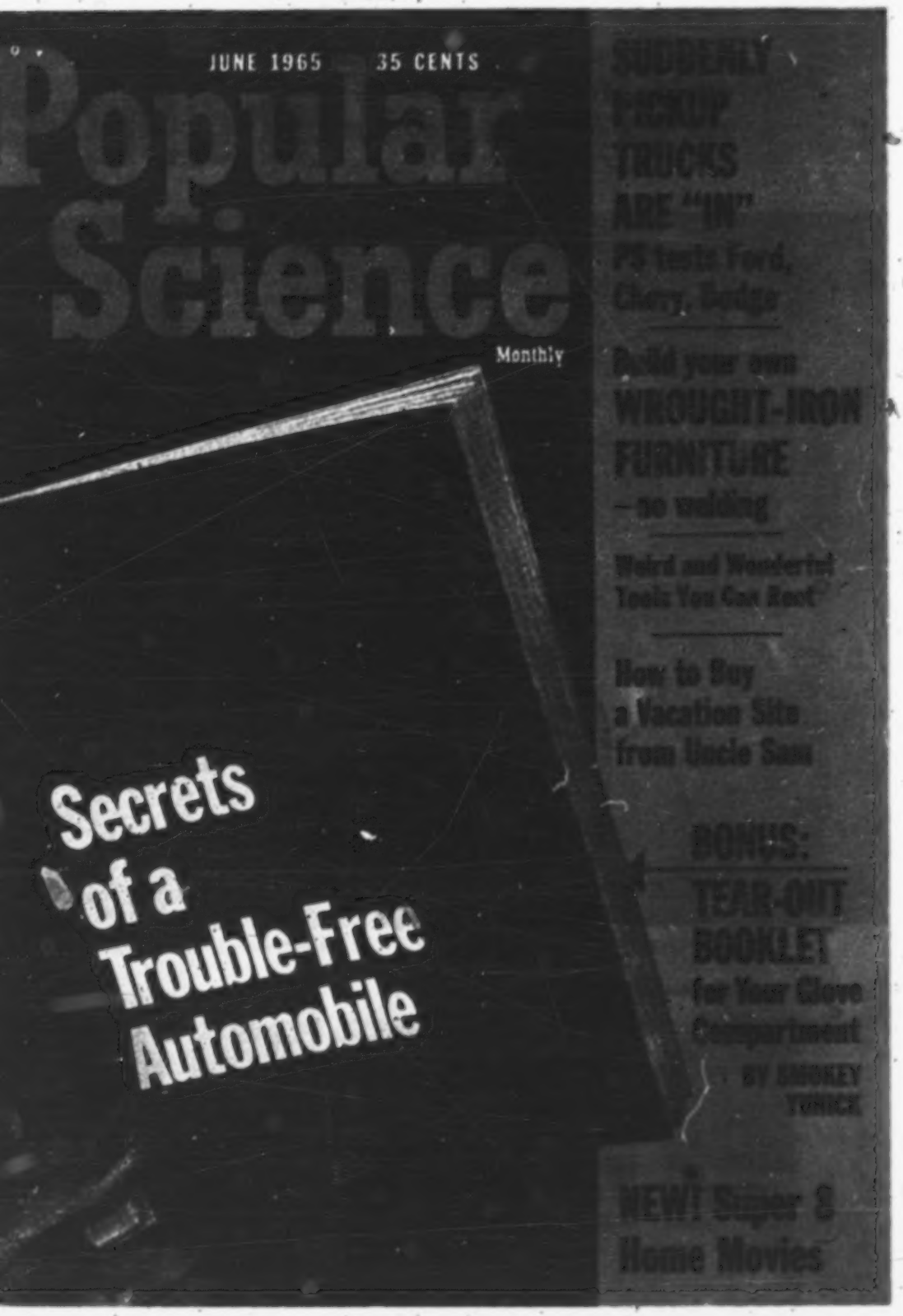
No Trace of Her

On Oct. 5, the U.S. attorney's office advised city police that Nancy Sue had withdrawn a small fortune in cash from her safety deposit box before vanishing.

Neither federal nor city police have found any trace of her.

Mrs. Glover has returned to Honolulu with Nancy Sue's personal effects.

Nancy Sue Shelton—her fate still a mystery.


JUNE 1965 35 CENTS
Popular Science
Monthly
Secrets of a Trouble-Free Automobile
SUDDENLY PICKUP TRUCKS ARE "IN"
PS tests Ford, Chevy, Dodge
Build your own WROUGHT-IRON FURNITURE —no welding
Weird and Wonderful Tools You Can Rent
How to Buy a Vacation Site from Uncle Sam
BONUS:
TEAR-OUT BOOKLET for Your Glove Compartment
BY SMOKEY YUNICK
NEW! Super 8 Home Movies

Our top anti-narcotics agent tells the inside story of how three nations combined to fight

The Dope-

Etienne Tarditti passes through Customs in New York, unaware agents have photographed him

The diplomats and their supporting cast

Robert Leon Le Coat, Paris gangster, helped set up smuggling operation.

Gilbert Coscia eluded net; helped reopen diplomatic pipeline for drugs.

Jean Baptiste Giacobetti, narcotics trafficker, teamed up with Coscia.

René Bruchon disagreed on price with U.S. contacts—blew whole deal.

Felix Alfred Barnier drew five-year sentence from the French court.

Smuggling Diplomats

By Henry L. Giordano
as told to
James C. G. Conniff

FOR years, we in the Federal Bureau of Narcotics have known that the international criminals who control the traffic in narcotic drugs regularly utilize high-ranking diplomats as couriers. If we could stop the diplomatic couriers, we could cut the flow of dope into this country to a trickle. Putting this criminal hierarchy out of business is a difficult assignment, however, because of their diplomatic status. One huge ring employing such couriers brought in the biggest consignment of heroin ever to enter the U.S.—one ton.

Cracking this case was one of the most difficult assignments in the 35-year history of the Bureau; its climax was one of the most satisfying.

We began moving in on the ring when our agent in Beirut learned that a huge shipment of morphine was en route from Lebanon to France. There, a supposedly reputable businessman, Etienne Tarditti, would receive the morphine, converted to heroin. Through his connection with French gangsters Felix Barnier, Gilbert Coscia, and Robert Le Coat, he would have it smuggled into the United States.

Henry L. Giordano, Commissioner of the U.S. Bureau of Narcotics since 1962, joined the Bureau as an agent in 1941. During World War II he served in the Coast Guard Intelligence.

Putting together the bits and pieces

How did the gang do the smuggling? We learned that: 1) Charles Bourbonnais, an airline purser on a Paris-New York run, was smuggling heroin into the U.S. for Tarditti and his friends and, for a one-percent commission, would bring back the payoff money. 2) More important, Tarditti had flown across the Atlantic with an unidentified Spanish-speaking diplomat who got VIP treatment from airline personnel.

We also learned that Bourbonnais used prearranged signals here when negotiating the turnover of drugs. He matched half-stubs of French lottery tickets with receivers

CONTINUED

Mauricio Claudio Rosal—Ambassador—was kissed off by his government.

Nicholas Calamaris was New York drop for shipment Rosal brought in.

Juan Carlo Aristi had company while smuggling—agents sat beside him.

Charles Bourbonnais delivered more than $1,000,000 to Paris dope ring.

Salvador Pardo-Bolland was decoy, but he didn't fool tailing federal men.

Driving with one hand, he jotted down

—first with a New Yorker named Robert Ager, and later with Joe Cahill (still a fugitive at this writing and the only member of the ring not yet brought to justice). Bourbonnais had successfully run his vicious contraband at least 50 times, earning over a million dollars for the Paris-based quartet.

Our next step, you might think, would be to arrest the whole gang without delay. But we wanted to nail every member of the ring; we didn't want the big ones to get away.

Flushing out a diplomat

If we could track down the mysterious Spanish-speaking diplomat, we would be in a position to determine whether he, too, was a runner. That would give us the chance to turn our tip from Beirut into a grand slam. We'd round up, not just the Paris ring, but its diplomatic front and New York contacts.

An exhaustive checkout by the French Sûreté and our agents in New York identified the courier the Tarditti ring had persuaded to misuse his diplomatic immunity. He was the Guatemalan Ambassador to Belgium, Mauricio Rosal.

What made us sure that Rosal was our man? Airline manifests showed his baggage was always 100 pounds heavier when he entered the U.S. than when he returned to Belgium. We knew those extra 100 pounds couldn't be diamonds —a flood of diamonds like that would have them selling for a dime apiece. They couldn't be gold—illicit traffic in gold is in the other direction; gold smugglers keep trying to get the stuff *out* of the country. Rosal's extra baggage could contain only drugs.

Late in September, 1960, we received a cable alerting us that Tarditti had left Paris with three suitcases to meet Rosal in Brussels. Tarditti then returned to Paris and booked a single air passage to New York for October 1. At the same time, the watch we had put on Rosal reported he was scheduled to fly from Brussels to New York on October 2. We were pretty sure he'd have Tarditti's three suitcases with him.

We made plans to tail this pair from the moment they landed. When Tarditti ducked into a taxi at Idlewild (now Kennedy) Airport, the driver was one of our agents.

"Sherry-Netherland Hotel!" snapped Tarditti.

"Sherry-Netherland it is, sir!" our agent repeated in a loud voice, so that other agents nearby would hear.

But Tarditti was slick. After the cab pulled away he leaned forward and said softly, "Make it the Savoy Hilton instead."

Our man at the wheel wasn't outsmarted. Driving with one hand, he jotted the change on a paper and dropped it out the window. Agents tailing the cab picked up the vital slip.

We had to plan a whole new reception. To provide extra time, Tarditti's "cab driver" complained he had to drive slowly because of engine trouble. Tarditti just snorted impatiently. By no coincidence, his room was just across from one occupied by our agents.

A touchy situation

Mauricio Rosal turned out to be trickier than we'd anticipated. He came in on a Pan-American flight, cleared quickly through Customs at the diplomat scales, but told a porter trying to steer him to our cab that a private car would pick him up. Our agents marked his bags with a knife for future identification while he wandered around the terminal.

A rented station wagon picked him up. The driver went so fast through heavy traffic to Manhattan that two of our cars had accidents trying to keep up. But we didn't lose him. Our men were at Rosal's side when he registered at the Plaza, directly across from the Savoy Hilton where Tarditti was.

Rosal could hardly have picked a

the address, dropped it out the window

more touchy time to smuggle in Tarditti's suitcases. A tumultuous session of the United Nations was under way. Khrushchev was pounding his shoe on his desk, while Fidel Castro and other Red leaders sat nearby. It was definitely not the time for a federal agency to arrest a diplomat unless it had an airtight case.

We had not yet actually had a chance to *see* what was in those three bags. Every agent who was in on the delicate operation, including District Supervisor George H. Gaffney (now U.S. Deputy Commissioner of Narcotics), had his fingers tightly crossed.

The next day, October 3, was D day. The delivery of Rosal's suitcases to the New York buyers was a maneuver so slippery—yet at the same time so clumsy—that we had to decide almost on the instant when to make our grab.

It went like this: Tarditti popped across the street to Rosal's room the evening he arrived, to make sure the suitcases had arrived, too. He made a second check next morning while Rosal was having breakfast.

The first payoff

Tarditti came back on a third visit, just before noon, with a small brown-paper bag—which he no longer carried when, a few minutes later, he left the Plaza for the last time.

Agents trailing Tarditti had seen him accept the paper bag at a meeting with the airline purser Bourbonnais on a park bench across from the Plaza, but it was not until later that we learned what it contained: $27,000 in cash, Rosal's payoff. Bourbonnais had received Rosal's fee earlier from Nicholas Calamaris, a hoodlum who had replaced Joe Cahill, who had in turn replaced Ager.

When Tarditti handed over the payoff money, he told Rosal to check out at 12:30 p.m. and take the suitcases in a taxi to 72nd Street and Lexington Avenue for a rendezvous with Calamaris. We were with him all the way. We saw Tarditti, Bourbonnais, and Calamaris have Rosal's driver open the taxi's trunk to prove the bags were there. Then Tarditti got in with Rosal and the cab turned east.

Bourbonnais and Calamaris headed north in the hoodlum's station wagon. We had no idea where they might be going to make the actual transfer, driving off in different directions like that, so it was now or never. And if we hadn't carefully coordinated our efforts with the State Department, it could have been never. But State had assured us that since Rosal was not en route to or from his post of duty, he had no diplomatic immunity. We could seize him without upsetting any international applecarts.

Second payoff—stiff sentences

Despite expected protests of immunity, we arrested Rosal with the drugs and payoff money. He swore the bags in the trunk weren't his, but the knife marks were there. Then Tarditti and company were gathered in. Another $41,000 for Tarditti was in Calamaris' wagon.

[Continued on page 202]

High-living diplomat Mauricio Rosal sits beside part of the huge haul of heroin he smuggled into the U.S. He's now serving a 15-year sentence in federal prison.

See DYNAKITS on demonstration!
N. Y. World's Fair
AR-DYNA
MUSIC ROOM
Better Living Center
Room 224

© 1965 New York World's Fair 1964 1965 Corporation

DYNAKIT
high fidelity

SCA-35
stered amplifier—$99.95

For the cost-conscious perfectionist
• AMPLIFIERS • TUNERS
• PREAMPLIFIERS
Write for detailed specifications and impartial test reports

DYNACO INC., 3912 Powelton Ave., Phila. 4, Pa.
Please send specifications and test reports to:
Name .....
Address .....
City ..... State..... PS-665

WORKING WITH WOOD?
FILL HOLES, DENTS AND CRACKS WITH
Wood Patch
Makes a smoother job, blends with unfinished wood, no shrinkage.

Putty Stik
Fills Nail Holes and Blemishes
Save finishing time . . apply prefinished paneling . . . set nails . . and putty last. Choice of 35 wood colors.
At Your Dealer, or Write
FIC FOREST INTERIORS CORP.
P.O. BOX 1818 SEATTLE WASH. 98111

The Dope-Smuggling Diplomats
[*Continued from page 103*]

Confessions quickly followed, with substantial jail sentences handed down by a federal court: 15 years each for Rosal and Calamaris, and nine each for Tarditti and Bourbonnais. In France, Barnier and Le Coat drew five-year sentences. Of the entire ring, only Gilbert Coscia eluded the net.

Rosal's arrest, however, hadn't completely plugged the diplomatic-courier pipeline through which narcotics flowed into the U.S. from France. In our efforts to track down Gilbert Coscia, our Bureau and the French Sûreté found that he and his accomplices had "continuation insurance." They had lined up a *second* diplomat.

This time, with help from the Sûreté and the Royal Canadian Mounted Police, we were able to focus on the then Mexican Ambassador to Bolivia, Salvador Pardo-Bolland, as our prime suspect.

Diplomat on the loose

We traced Pardo-Bolland to Cannes, on the French Riviera. He was there on a fraudulent Mexican passport identifying him as Suarez Lorenzo de Mendoza. After we had him under surveillance, we saw him talking with Juan Arizti, the Uruguayan Ambassador-Designate to Colombia. Then we saw the pair meet with the fugitive Gilbert Coscia and another French narcotics trafficker, Baptiste Giacobetti.

The new coalition tried a decoy. In mid-February, 1964, they sent Pardo-Bolland to New York with two suitcases full of liquor and paperback books. Earlier, imagining they would throw us off the scent with the ruse, they had Arizti go to the Nice airport with his own two bags and pick up four more at the checkroom there. These four bags Arizti took by air to Montreal.

One of our agents flew beside Arizti in the plane to Montreal. At the airport, Arizti used his diplomatic passport to get the bags through Canadian customs without a search. Then he took a taxi (with our agents right behind him) to the Canadian National Railroad Station. There Royal Canadian Mounties, disguised as floor sweepers, watched Arizti store the bags in lockers.

With a writ of assistance, the Mounties opened the lockers, had their lab do a fast analysis on the plastic bags of white powder to make sure it was heroin. They replaced all but about a quarter-pound in each suitcase with ordinary flour. Next day, our own

CONTINUED

SMALL NYLON BEARING MAKES BIG PERFORMANCE DIFFERENCE

That's why RIDGID Pipe Cutters are easiest to use . . . cut the straightest!

Cuts all ⅛″ through 2″ pipe and conduit

Start feeding a RIDGID Cutter into a pipe and you'll feel a remarkable difference. Its smooth, cushioned action makes cutting easier, faster and more accurate. Why? Because the feed screw turns freely on a nylon bearing. This same bearing also absorbs shocks, resulting from uneven pipe surfaces, to let the cutter wheel track smoothly. This means less work for you . . . and straight, even cuts every time.

You can get this Cutter and other RIDGID Work-Saver Tools at your Dealers.

RIDGID.

THE RIDGE TOOL COMPANY, ELYRIA, OHIO, U.S.A.

HIGH-POWERED *motorcycling fun*

with a

1965 BSA THUNDERBOLT

BSA brings you a fast 40 cubic inch twin for touring enjoyment. A superb design giving finest handling, the BSA Thunderbolt has chromed full valanced fenders, chrome on tank sides and on many details, polished alloy engine-gearbox unit, and rich metallic blue finish. See it for yourself at your BSA dealer.

BSA MOTORCYCLES

Write to nearest address for free catalog of 1965 models.

Catalog offer limited to U.S. residents only

West:	East:
BSA Motorcycles-Western	BSA Incorporated
Dept. S-65	Dept. S-65
3074 Broadway	639 Passaic Ave.
Oakland, California	Nutley, New Jersey

The Dope-Smuggling Diplomats

men and the Mounties watched Arizti lug his bags into a train bound for New York.

We gave this courier the red-carpet treatment on his arrival in New York. We made movies of everything he did. One of our agents in redcap disguise took his luggage and, at Arizti's request, put it in the baggage room. The man who received the bags was also an agent.

Our agent-redcap saw to it that the cab Arizti got into was one driven by a narcotics agent, so we had no problem finding out that he was staying at the Elysee Hotel. This was the same hotel the ring had picked for Pardo-Bolland.

Arizti turned the baggage checks over to Pardo-Bolland. Coscia phoned Pardo-Bolland from Nice and told him to get those baggage checks to a Jean Le Roux staying at the Hotel Americana (and under surveillance).

Closing the net

Our agents recognized Le Roux as a notorious French hoodlum whose real name was René Bruchon. Just outside the Americana, Bruchon met a narcotics delivery man —an associate of convicted traffickers. As our agents watched, they argued about the payoff price, then broke off the talks.

Soon, telephone calls to Bruchon from Switzerland told him to alert Arizti and Pardo-Bolland, and get out of the United States at once. Almost in lock step with our agents, they went to Swissair for tickets.

Agents followed Bruchon and saw him drop a set of keys into a street trash basket. We promptly retrieved them, tried them on the locks of Arizti's bags. They all worked.

It was time to move in. Our weary New York detail scooped up the two diplomats, their French gangster contact, and his two New York bagmen in a beautifully coordinated grab. Abroad, the Sûreté took Coscia and Giacobetti at the same time.

Pardo-Bolland, who lost diplomatic immunity by booking passage back to Europe on Swissair instead of continuing on to Mexico, won from his country the same prompt disavowal that Rosal had received from his. He went to jail for 18 years. Uruguay gave the same abrupt kiss-off to Arizti, who drew a sentence of 10 years. Coscia and Giacobetti come to trial soon.

The two cases yielded 354 pounds of pure heroin worth, conservatively, $33 million on the illicit market. ■ ■

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 28 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 603

JOSEPH ARMONE and STEPHEN GRAMMAUTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS,
Attorney for Petitioners,
Joseph Armone and Stephen Grammauta,
66 Court Street,
Brooklyn, New York.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	6
Statement of the Case	6
Reasons for Granting the Writ	13
Conclusion	45
Appendix A	1a
Appendix B	2a

TABLE OF CASES

Arnold v. United States, 94 F. 2d 499, 501, 506-509 (C.C.A. 10, 1938)	36
Atkins v. United States, 307 F. 2d 937 (9th Cir.)	40
Bacino v. United States, 316 F. 2d 11, 14 (C. A. 10, 1963)	44
Caminetti v. United States, 242 U. S. 470, 495-496	3, 35, 36
Causey v. United States, 352 F. 2d 203, 207 (C. A. 5, 1965)	39
Dusky v. United States, 362 U. S. 402	31
Fain v. United States, 209 Fed. 525, 533 (C.C.A. 8, 1913)	36
Freed v. United States, 266 Fed. 1012, 1014-1016 (D. C. App. 1920)	36
Gordon v. United States, 164 F. 2d 855, 859 (C.C.A. 6, 1947), cert. den. 333 U. S. 862	36
Grunewald v. United States, 353 U. S. 391	39, 40
Henry v. Mississippi, 379 U. S. 443	44

PAGE

Holmgren v. United States, 217 U. S. 509, 523-524 ..... 3, 4, 35, 36, 37

Leff v. United States, 15 F. 2d 686, 689 (C.C.A. 8, 1926) 36

Masters v. United States, 351 F. 2d 105 (C. A. 8, 1965) 36

McGinnis v. United States, 256 Fed. 621 626 (C.C.A. 2, 1919) 36

Morenkow v. United States, 276 Fed. 293, 294 (C.C.A. 6, 1921) 36

Mount v. United States, 333 F. 2d 39 (5th Cir.), cert. den. 379 U. S. 900 40

Osborne v. United States, 351 F. 2d 111 (C. A. 8, 1965) 36

Patterson v. United States, 222 Fed. 599, 650 (C.C.A. 6, 1915) 43

People v. Cohen, 223 N. Y. 406, 118 N. E. 886 (1918), re-arg. den. 227 N. Y. 623, 125 N. E. 921 34

People v. Kress, 284 N. Y. 452, 31 N. E. 2d 898 (1941) 34

People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588 (1903) 34

Pouncey v. United States, 349 F. 2d 699 (C.A.D.C. 1965) 32

Rochin v. California, 342 U. S. 165, 172, 173 32

Rossi v. United States, 9 F. 2d 362, 366 (C.C.A. 8, 1925) 36

Rudner v. United States, 281 Fed. 516, 521 (C.C.A. 6, 1922) 36

Smith v. United States, 224 F. 2d 54, 60 (C. A. 5, 1955) 36

Snyder v. Massachusetts, 291 U. S. 97 31

Stanley v. United States, 245 F. 2d 427, 433 (C. A. 8, 1965) 36

Stewart v. United States, 131 F. 2d 624 (C.C.A. 5, 1942), cert. den. 318 U. S. 779 36

Sykes v. United States, 204 Fed. 909, 913 (C.C.A. 8, 1913) 36

PAGE

Thomas v. United States, 151 F. 2d 183, 186-187 (C.C.A. 6, 1945) 43-44

United States v. Agueci, 310 F. 2d 817 (C. A. 2, 1962), cert. den. 372 U. S. 959 38

United States v. Kelly, 349 F. 2d 720, 758-759 (C. A. 2, 1965) 32

United States v. Leggett, 312 F. 2d 566, 573-574 (C. A. 4, 1962) 44

United States v. Murphy, 253 Fed. 404, 406 (N.D.N.Y. 1918) 36, 37

United States v. Negro, 164 F. 2d 168, 171 (C.C.A. 2, 1947) 43

United States v. Puff, 211 F. 2d 171, 180 N. (C. A. 2, 1954), cert. den. 347 U. S. 963 44

United States v. Roach, 321 F. 2d 1 (C. A. 3, 1963) ... 44

United States v. Robbins, 354 F. 2d 741 (C. A. 2, 1965) 44

United States v. Valentino, 283 F. 2d 634, 635 (C. A. 2, 1960) 32

Valdez v. United States, 244 U. S. 432 35

Wagman v. United States, 269 Fed. 568, 572 (C.C.A. 6, 1920) 36

Williamson v. United States, 332 F. 2d 123, 132 (C. A. 2, 1964) 44

STATUTES

18 U.S.C. § 174 ..... 5, 6

18 U.S.C. § 3481 6

21 U.S.C. § 173 ..... 5, 6

28 U.S.C. § 1254(1) 2

OTHER AUTHORITIES

Annotation, 144 A.L.R. 199 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

JOSEPH ARMONE and STEPHEN GRAMMAUTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Joseph Armone and Stephen Grammauta, pray that a writ of certiorari issue to review the judgment (as to each of them) of the United States Court of Appeals for the Second Circuit entered in this case on July 8, 1966 (Appendix A hereto, *infra*).

Opinions Below

The opinion of the Court of Appeals, printed as Appendix B hereto, *infra*, is not yet reported. The District Court did not write any formal opinion.

Jurisdiction

The judgment of the Court of Appeals as to each of the within petitioners was entered on July 8, 1966 (Appendix A hereto, *infra*). A timely petition for rehearing by each of these petitioners was denied by the Court of Appeals on July 28, 1966. The time for filing this joint petition for certiorari has been extended by Mr. Justice Harlan to and including September 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioners are among four defendants who were convicted of narcotics conspiracy. The questions are:

1. As to petitioner Armone—

   (a) Was petitioner denied a fair due process trial by the Trial Court's refusal to grant his motion for severance which was requested on the ground of petitioner's severely toxic physical illness which mentally disabled him from attentiveness to and understanding of important trial testimony and from effectively participating with counsel in the trial?

   (b) Treating the medical and other relevant testimony as having uncontradictedly established petitioner's severe toxic illness and consequent mental disability (which we shall demonstrate was the case here), was it error to rule that petitioner's due process right as a defendant on trial to be effectively "present" during the taking of trial testimony was overborne by the Trial Court's evaluation of the trial testimony thus received during petitioner's physical and mental disability as not having been prejudicial to petitioner? Does due process allow of any such novel policy for curtailment of a defendant's right

to be "present" during the taking of trial testimony merely because the trial Judge deems the particular testimony not prejudicial to the defendant?.

(c) In actual fact, did not the trial testimony taken during petitioner's physical and mental disability include important items which were very prejudicial indeed to petitioner?

2. As to petitioner Armone, has there occurred in this case a fundamental miscarriage of justice in that an innocent man has been unjustly convicted and sentenced to what amounts to probable lifetime imprisonment on the basis of indicatedly fabricated testimony by basely discreditable accomplice witnesses who were not corroborated? Did the circumstances mentioned in Questions 3 to 8, inclusive, *infra*, work such a miscarriage of justice in especially aggrieving ways as affects petitioner Armone?

(The following questions apply to both of the within petitioners.)

3. The sole proof directly inculpative of both of these petitioners on the conspiracy charge having consisted of uncorroborated accomplice testimony by witnesses of inordinately base credibility who moreover were devastatingly impeached, did not the "better practice" rule of, *e.g.*, *Holmgren* v. *United States*, 217 U. S. 509, 523-524, require that the Trial Court in this particular case grant the express defense request for a jury instruction that credence should not be given to the accomplice witnesses without corroborating testimony? In the circumstances of this case, was it not error to decline to obey the aforesaid "better practice" rule? Has there not come about in the lower Federal Courts an erroneous doctrine that corroboration of accomplice testimony is *never* required, based upon an oversimplified reading of this Court's carefully phrased language in *Caminetti* v. *United States*, 242

U. S. 470, 495-496, where the Court noted the *Holmgren* "better practice" rule, noted also its approval of that rule by stating that "* * * this is so, * * *", and then added merely that "* * * there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them"?

4. It being undisputed that a certain alleged conversation about counterfeit money which was submitted to the Jury as supposedly being the subject of overt act No. 10 had not been the subject of any testimony before the Grand Jury and had therefore not been charged in the indictment—i.e., it being undisputed that overt act 10 as submitted to the Jury was a matter of outright mistake in the conduct of the trial—the following questions arise:

(a) Were petitioners denied a due process fair trial in being convicted on a charge not contained in the indictment?

(b) Were petitioners denied a due process fair trial by reason of the confusion which must almost surely have vitiated any rational deliberation by the Jury in connection with the disorganized circumstances at the trial relating to overt act No. 10?

(c) Were petitioners denied a due process fair trial in that it is impossible to be sure that the jurors reached a unanimous verdict, in view of the circumstances in connection with overt act No. 10?

(d) In any event, could the alleged conversation about counterfeit money be an "overt act in furtherance of the conspiracy," since all that had happened in connection with this alleged conversation was that one defendant expressed a general attitude of concern or fear that the counterfeit money incident might lead to an investigation, there being no reference to narcotics in the conversation? And even if this expression of fear of an investigation could rightly be thought

by a trier of fact as referring to a narcotics investigation, does it not transgress all possible bounds of the law of overt acts in conspiracy prosecutions to treat such a merely general expression of fear of detection as amounting to "an overt act in furtherance of the conspiracy" on a theory of "concealment" or on any other theory?

(The following Questions 5 to 8, inclusive, are not argued in this petition but are preserved in the event of the granting of certiorari.)

5. Were petitioners denied a due process fair trial by the reception in evidence of (a) proofs in disregard of the "other crimes" rule, and (b) proofs of "guilt by association"; and by prejudicial instructions to the Jury and prejudicial statements in the prosecutor's summation relating to these items?

6. Were some of the "guilt by association" items additionally prejudicial because they partook also of the improper admission in evidence of items seized from an alleged co-conspirator subsequent to the latters' arrest?

7. Were petitioners denied a due process fair trial and, in the case of petitioner Armone who did not take the stand was there also a denial of the constitutional and statutory privilege to refrain from doing so, by the instructions to the Jury concerning the statutory inference or presumption in 21 U.S.C. § 174?

8. Were petitioners denied a due process fair trial in that the prosecutor's failure to disclose facts pointing to a "deal" with the main prosecution witness Charles Hedges, deprived the defense of an important opportunity to impeach Hedges?

9. Petitioners respectfully adopt the Questions Presented in the companion petitions herein, insofar as applicable to our case and consistent with our contentions.

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment (due process and self incrimination) and the Sixth Amendment (right of counsel and confrontation) of the United States Constitution. It also involves 18 U.S.C. §§ 173 and 174 (narcotics violation and conspiracy) and § 3481 (defendant as witness); these statutes are quoted in the companion petition for certiorari of petitioner Vincent Pacelli, pages 5-7.

Statement of the Case

Petitioners were convicted in the United States District Court for the Southern District of New York (Bonsal, J.) after a jury trial, under a one count indictment for conspiracy to sell and distribute narcotic drugs in violation of 21 U.S.C. §§ 173 and 174(a). Petitioner Armone was sentenced to fifteen years imprisonment and a fine of $20,000. Petitioner Grammauta was sentenced to eight years. On appeal to the United States Court of Appeals for the Second Circuit the convictions were affirmed.

The indictment (24a) alleged, that from about March 1956 to the date of the filing of the indictment (September 30, 1964), in the Southern District of New York, the defendants and co-conspirators conspired to import large amounts of narcotic drugs from France and other countries and to sell, etc., such narcotics. The indictment alleged eleven overt acts, but only the last two of these, overt acts 10 and 11, were submitted for consideration to the trial jury, all of the other alleged overt acts being found by the Trial Court to have been barred by the statute of limitations. Overt act 10 read as follows:

> "10. In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960, in the Southern District of New York, the

defendant JOSEPH ARMONE was in the vicinity of 122 Second Avenue, New York, New York."

The Bill of Particulars gave the following further specifications concerning Overt Act 10:

"10. During March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City."

As will appear, a major issue in this case is presented with respect to the proof of Overt Act 10 and the Trial Court's instructions to the Jury thereon.

The Government's main witness was Charles Hedges, who testified, as an alleged co-conspirator, concerning the conspiracy as a whole. The other Government witnesses included several alleged overseas narcotics couriers. However, the only proof specifically inculpative of petitioner Joseph Armone personally came from Hedges and one James Godwin, a cousin of Hedges and a co-conspirator; the only proof specifically inculpative of petitioner Grammauta came from Hedges. Hedges, supported in some points by Godwin, placed petitioner Armone in the role of a receiver or "importer" of the foreign narcotics. Hedges placed petitioner Grammauta in a similar role.

We do not expect the Government to dispute that without the testimony of the two accomplice witnesses Hedges and Godwin there would have been no case against either of the within petitioners; or that there was no corroboration of those two accomplice witnesses as regards any of their testimony specifically relating to Armone or Grammauta.

Hedges' performance on the witness stand can only be described as grotesque. He displayed incredible insolence towards defense counsel, a sneeringly cynical attitude about his own untruths and altogether a distorted testimonial mentality (e.g., Tr. 425, 428, 430-431, 941-943, 981-982, 1035-1037, 1043, 1078, 1101-1102). It was not surpris-

ing to learn that Hedges had been discharged from the Army on some kind of psychoneurotic or psychopathological ground (Tr. 1042).

Hedges admitted with blitheness and apparently with relish, an astounding series of minutely detailed rank fabrications to which he had sworn under oath in a prior narcotics trial in Connecticut involving many of the same incidents as in this trial (e.g., Tr. 456, 569-575, 578-581, 648-649, 651, 653, 689-694, 708-711, 933-934). With no apparent indication of uncomfortable conscience, Hedges barefacedly contradicted himself, in instance after instance, on such important topics as whether his testimony had been rehearsed with the prosecutor (Tr. 551-552), whether he had been assisted or coached in the development of vital details of his testimony by the Narcotics Bureau investigators (Tr. 763-764, 783-789, 802-803, 833, 909-912, 1180-1206, 1307-1348), and as to whether he had actually (as he said) not minded remaining in jail (after conviction in the Connecticut narcotics trial, *supra*) and in fact liked it or whether instead he had been so desparate to get out of jail that he had even contemplated an escape* (Tr. 696-697, 941-943, 981-982, 989). Apparently emboldened by the Court's seemingly indulgent attitude in the face of his antics on the witness stand, Hedges blurted out that the defendants at one time had wanted him to rob a bookmaker (Tr. 1113-1114), and that the defendants would have come up to Connecticut (presumably to murder him) if he had testified differently in that trial (Tr. 1101-1102)—motions for mistrial on the ground of these statements of Hedges were denied (*ibid.*).

Hedges' attitude when repeatedly confronted with his notorious inaccuracy in the matter of vital dates, was not merely one of acquiesence but it was practically boastful (e.g., Tr. 425, 427, 481, 506-512, 535-536, 549-550, 609-611).

---

* Hedges' consuming ardor to get out of jail was indubitably his reason for testifying in this case (*infra*).

Hedges' cross examination on specific items relating to Joseph Armone was especially revealing. Thus, he was unable to give any satisfactory explanation of a discrepancy between his testimony that the first time he gave money to Joseph Armone was around September 1959, and his testimony that in April or May of 1959 Joseph Armone had reproached him for a shortage in a "bundle" of money which Hedges had sent to him (for the development of this portion of the cross examination see Tr. 1041, 1075-1078, 1082-1088, 1244-1247, 1253-1261, 1283-1285). Thus, also, it was shown that Hedges was lyingly attempting to substitute Joseph Armone for Arnold Romano (an absent defendant) in connection with alleged discussions about the amount of payments to be given to Hedges, and at one point, under the pressure of this phase of the cross examination* Hedges suddenly declared that it was Steve Armone** (not Joseph) who was the "head of that crowd" (Tr. 857, 913-914, 1034-1041).

There was a similar collapse of Hedges' testimonial position on the whole alleged phase of Joseph Armone's having put Hedges into contact with the severed defendant Nick Calamaris—in an alleged major new conspiracy phase—around the end of an "inactivity" period in the Winter of 1959-1960, Hedges acknowledging on cross examination that instead of speaking of Nick *Calamaris* in that entire connection he had meant to speak of Nick *Viscardi* (Tr. 1269-1278).

But perhaps the most notable development in the Hedges testimony as regards the specifics of the case against Joseph Armone, came in the cross examination at Tr. 1290-1297 (192a-195a), where Hedges admitted that except for one innocuous reference about a motor trip to Newburgh (which involved nothing wrongful), his detailed handwritten notes which he had prepared in prison for

---

* Which moreover dealt with hapenings in October 1958 when Joseph Armone was concededly not even in the picture yet at all.

** Steve Armone, a brother of Joseph, died in 1960.

Narcotics Agent Dugan (Government's Exhibit 25) contained no reference whatever to Joseph Armone, i.e., this handwritten document which Hedges himself swore was as accurate and complete as he could make it in matters of substance (e.g., Tr. 482, 1066-1068), *contained not one word concerning the numerous circumstantial accusations which Hedges made against Joseph Armone in this trial.*

(The handicaps of conventional space limitation in a petition for certiorari are being especially felt by us at this juncture of our presentation where we are treating the testimony of the execrable Charles Hedges. For example, in our brief in the Court of Appeals, despite drastic efforts at conciseness, we found it necessary to devote four full pages (pp. 11-15) to a factual elucidation of just one of Hedges' plainly fabricated items concerning Joseph Armone, namely, Armone's alleged connection with the single most important alleged narcotics importation phase (involving a courier named Clarence Aspelund). At the risk of sounding unseemly importunate, we earnestly state that the normal yearning of a party for the boon of certiorari review by this Court is all the more intense on our part here because we are convinced that if we were given the opportunity, in the more ample space of a brief on the merits, to invite this Court to see for itself the intricate details of Charles Hedges' indicatedly concocted "case" against petitioner Joseph Armone particularly, there would be a very good chance that the Court would find much more than mere rhetoric of counsel in our suggestion in our Question no. 2, *supra,* that Armone especially (but Grammauta as well) has been the victim of an outright miscarriage of justice through the Government's resort to demonstrably false testimony by basely discreditable accomplice witnesses who were not corroborated in their accusations against our two petitioners.*)

---

* We are not speaking here merely of jury-type issues as to "credibility" or "sufficiency of the evidence"; we are speak-

(Footnote continued on following page)

We note under our "Reasons", *infra*, certain details concerning Hedges' "deal" with the Government whereby a fifteen-year prison sentence which he was serving was reduced to five years (he obtained his freedom around the time of the end of the within trial).

Co-conspirator James Godwin, Hedges' cousin, testified for the Government (Tr. 1852 *et seq.*; 218a *et seq.*).* Godwin at the time of this trial was serving a sentence of 3½ to 7 years in Greenhaven State Prison for robbery, and a concurrent sentence for burglary (Tr. 1853-1854). Additionally, Godwin had a criminal record that is little short of amazing; he is apparently a classic example of inveterate criminality commencing in early boyhood (Tr. 1855-1856). When asked whether he planned to become involved in more armed robberies once he got out of jail, Godwin answered "How can I tell you * * * how could I tell you the future sitting on the stand" (Tr. 2036).

Godwin testified, *inter alia*, that around March 1960 he gave a one hundred dollar bill to Andy Dillon in Lulu's Bar getting one hundred singles in change (Tr. 1865-1866). About a week later Joseph Armone reproached Godwin and Hedges for Godwin's having given "us" a counterfeit hundred dollar bill, and when Hedges offered to make good the amount, Armone said "It ain't the one hundred dollars, it is the investigation that is going to be involved" (Tr. 1866-1868); the defense moved to strike this testimony and for a mistrial (Tr. 1868).

(Footnote continued from preceding page)

ing of the fundamental issue of policy, in the administration of Federal criminal justice, as to whether it must really be taken as settled beyond possibility of change that *no* Federal criminal prosecution need ever be subjected to the "better practice" rule of corroboration of accomplice testimony.

* The Godwin testimony as excerpted in the Joint Appendix is confusing. We shall therefore cite his testimony from the Transcript.

(Hedges also had testified that around April or May of 1960 there was a conversation which commenced in a restaurant across from Lulu's Bar and which continued in Lulu's Bar, between Hedges and Andy Dillon, joined by Joseph Armone and James Godwin when Dillon and Hedges went over into Lulu's Bar, and in this conversation "Joe Armone told me that the hundred dollar bill that Jimmy [Godwin] had given to them was going to cause a lot of trouble. He said, 'These people have been looking to open up investigations on us for quite awhile. Now is the opportunity' ", whereupon Hedges offered to pay the hundred dollars—which was a counterfeit—and Joseph Armone said "It is not the hundred dollars. It is the trouble that the hundred dollar bill can cause" (164a-165a); the defense strenuously objected to the reception of this evidence and moved for a mistrial on the ground that it was evidence of another and unrelated crime (*ibid.*).)

When cross examined concerning the incident of the one hundred dollar counterfeit bill, Godwin said that Andy Dillon at Lulu's Bar was taking horse bets on the telephone at the time when Godwin exchanged the hundred dollar bill for singles (Tr. 2058-2059).* Godwin also said that he had obtained the hundred dollar bill from a friend of his named Mickey, who had owed Godwin $60 and had given him the hundred dollar bill asking for $40 in change (Tr. 2064).** Especially interesting was Godwin's testimony on cross examination at Tr. 2071, when he said with some petulance that the entire episode of the one hundred dollar bill was "making a big issue out of nothing"; in other words Godwin who supposedly would be in a position

---

* It thus appears that Joseph Armone's alleged remarks about fearing an investigation in connection with the counterfeit bill would most logically have related—if such happened at all—to a fear of a bookmaking investigation, not narcotics.

** Here, then, is positive evidence, from the Government's own witness, that the one hundred dollar counterfeit bill could not possibly have had any relation to any alleged narcotics aspects.

to understand the larger sinister significance of this episode (if there were such), considered the entire incident of no importance.

Godwin admitted that he had told someone in Greenhaven Prison, or while he was out of jail, that one of the defendants in this case was innocent (Tr. 2048).

Godwin had sought out the Federal Narcotics Bureau while he was in prison, evidently with a view to purchasing favor for himself by offering information concerning narcotics transactions (Tr. 1903-1904). Thereafter Godwin got a much lighter sentence in a certain State proceeding than he had expected (Tr. 1904-1907). See also Tr. 1927, where remarks of the State sentencing Judge are quoted, in which reference is made to Godwin's offer to cooperate with the Federal Narcotics Bureau.

Petitioner Grammauta took the stand in this trial to testify in his own behalf, denying the charges in the indictment (Tr. 3439 *et seq.*).

The facts as to petitioner Armone's illness during the trial (Question no. 1, *supra*), as to the mistaken instructions concerning overt act No. 10 and the counterfeit money incident (Question presented no. 4, *supra*), and as to other topics alluded to in our Questions Presented but not touched upon in this Statement of the Case, will be taken up in appropriate connections *infra* under our "Reasons", which next follow.

Reasons for Granting the Writ

I

As to petitioner Joseph Armone this case presents an unusually compelling issue of due process and of the fair administration of Federal criminal justice. It was grievous error, involving a judicial insensitivity to due process

which is surprising in the present day, to deny Armone's motions for a severance which was requested on the ground of his grave illness during the trial, his consequent inability to maintain an effective attentiveness to the trial proceedings, and his inability to confer or to cooperate effectively with his counsel.

Joseph Armone, some months prior to this trial, had suffered an abdominal gunshot wound from which he had narrowly escaped with his life only after massive emergency surgery; and at the time of this trial he was still suffering from a pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition (361a-368a). During the course of the trial the Court saw fit to remand all of the defendants for the duration of the trial, whereupon Mr. Lewis, counsel for Joseph Armone, apprised the Court of his client's medical problem and that he would be needing periodic treatment from his regular physician, Dr. Louis Rosati, who was a noted surgeon and who had performed the surgery that had saved Armone's life. The Court, we readily state, took a cooperative attitude concerning this. On May 21, 1965, during the trial, Joseph Armone's counsel advised the Court that his client would need to see his doctor on that day (232a); and on May 28, 1965, counsel again advised the Court that Armone needed treatment and that he was in pain (284a).

On Tuesday, June 8, 1965 Mr. Lewis advised the Court that Joseph Armone was seriously ill, he had been vomiting all night at the West Street Prison (329a-334a). A little later that day the situation became evident to everyone, and Joseph Armone had to be taken by ambulance in a state of collapse to a hospital, the Columbus Hospital, where the Government had him examined by Dr. Henry Jaffee (who did not testify herein); from Columbus Hos-

pital Armone was moved to the prison ward at Bellevue Hospital (334a-339a).

On the following day, Wednesday, June 9, 1965, Mr. Lewis moved for a severance for Joseph Armone (339a-340a); meanwhile Armone had been forced to come back to Court that afternoon, although we think we may fairly say it was perfectly manifest that he was suffering very much (339a-341a). *He had received no medical assistance at Bellevue Hospital except for being put on a fat-free diet* (408a-409a). On that resumed trial day (Wednesday, June 9) Joseph Armone was compelled to suffer through the trial proceedings while important testimony for the defense was received in contradiction of essential parts of Hedges' testimony (Zimbler, Tr. 3266-3270; Landi, Tr. 3270-3290; Greenberg, Tr. 3926-3300; Zimbler resumed, Tr. 3300-3301), and while important testimony was taken also from Narcotics Agent Dugan concerning his dealings with Hedges during Hedges' "cooperation" while confined in a Federal prison (Tr. 3302 *et seq.*). Near the end of that court day (Wednesday June 9), Mr. Jacobs, the Prosecutor, informed the Court that the Bellevue physician had said Joseph Armone could be in Court the next day (342a). Mr. Lewis told the Judge "This man is sick right now, * * * I don't think there is one out of a hundred defendants who would sit in the courtroom like this man is doing" (342a), to which the Court calmly replied "Let us proceed today. He is here and we will finish up" (342a).*

When the trial commenced on Thursday morning, June 10, it turned out that Mr. Jacobs' prediction of the pre-

---

* Armone's counsel, Mr. Lewis, had been unavailingly urging upon Judge Bonsal, the Trial Judge, that Armone's "health and his right to be aware of everything that is taking place and his right to confer with his counsel are paramount to any onerousness that may be placed upon any of the jurors who may have something else to do" (340a). We are obliged to mention that a lady juror wanted to go on a vacation cruise, and that this was repeatedly urged by the Court upon counsel, as necessitating expedition of the trial (Tr. 3137; 331a, 339a, 347a, 348a, 351a).

vious afternoon was wrong, and that the Bellevue physicians had refused to let Joseph Armone be brought to Court that morning (343a). Indeed, it turned out that Armone's condition was so serious—to an extent which was now obvious to everyone—that the trial was adjourned for that Thursday, and for the following day, and was not resumed, then, until Monday morning, June 14 (343a-352a).

When the trial resumed Monday June 14, Armone having been brought to Court, Mr. Lewis advised the Judge that Armone was "physically and mentally unable to continue with the trial at the present time. He tells me that he was vomiting all morning and they gave him injections to try to stop the vomiting"; Mr. Lewis, also protested that the Bellevue doctor who was apparently handling Armone's case was merely an interne (352a). The zealous prosecutor delivered himself of an argument, the gist of which may fairly be characterized as being that any doubts should be resolved against Joseph Armone's health and in favor of the Government's desire to have him continue present at the trial (353a-355a).* The Trial Court noted counsel's objection and stated that he would like to have a hearing and the testimony of the various doctors as to Armone's condition (355a). Mr. Lewis again objected to proceeding with the trial at that time, moved again for a severance, and moreover he advised the Court that he was obliged to absent himself for awhile that morning (Monday, June 14) on another matter in the Federal Courthouse (Tr. 3359). Joseph Armone gallantly consented to let Mr. Lewis be excused for the latter purpose and to have another of the defense attorneys, Mr. Krieger, cover for him (Tr. 3359-3360). The Court directed that the trial continue, and over the next hours there was received in evidence the extremely important defense testimony from

---

* Cf. our last footnote, *supra*, concerning the vacation-cruise plans of the lady juror.

the witness Nicholas Calamaris, who had been subpoenaed for the purpose from a Federal prison, and whom the prosecutor relentlessly cross-examined (Tr. 3362 *et seq*). The witnesses who followed Calamaris on that day were the defense witness Philip Gray, who testified on an important issue of contradiction of Hedges (Tr. 3432 *et seq.*), the co-defendant Grammauta testifying in his own behalf (Tr. 3449 *et seq.*), and the co-defendant Alfred Armone testifying in his own behalf (Tr. 3479 *et seq.*).

When Court resumed on Tuesday morning June 15, Mr. Lewis advised the Court that Joseph Armone "tells me he feels very ill today" (358a), to which the Court responded, "All right, that has been noted" (358a). There followed testimony by a defense witness (Kimball) called to elucidate the narcotics courier Bourbonnais' motivation for testifying (Tr. 3533 *et seq.*), the testimony of the co-defendant Viscardi in his own behalf (Tr. 3567 *et seq.*), the testimony of John Federico called by Joseph Armone to testify concerning his employment and earnings (Tr. 3572 *et seq.*), the extremely important testimony of Sol Gold called by Mr. Lewis to refute James Godwin's testimony that he had not said that the defendants were innocent (Tr. 3580 *et seq.*), the testimony of Joseph Armone's wife concerning his acquaintance *vel non* with various of the defendants and co-conspirators (Tr. 3610 *et seq.*), the testimony of a Government witness (Deirdre Quinn) called to refute testimony of Viscardi (Tr. 3620 *et seq.*), similar testimony by Government witness Durham, a narcotics agent (Tr. 3632 *et seq.*), and vitally important resumed testimony by James Godwin called to refute Sol Gold (Tr. 3636 *et seq.*).

Also on Tuesday June 15 the Court heard medical testimony and testimony from Joseph Armone himself concerning his condition; for the entirety of this testimony, see 361a-368a, 378a-429a, 545a; Tr. 3920-3936; Tr. 4293-4358a—the item last cited being testimony by a physician for the Government (Dr. Kostecki) which was received

after the jury verdict, for reasons best known to the Honorable Trial Judge but which escape our understanding.*

Dr. Arthur H. Aufses of Bellevue Hospital, called by the Government, testified that he had examined Armone at Bellevue on Thursday, June 10 at the instance of the Government (378a). He examined Armone for fifteen minutes. Armone had a relatively rapid pulse, appeared to be in pain, in the region of the fistula opening in the abdomen there was a mass which was moderately tender (379a). He could not venture an opinion whether on Monday, June 14, Armone could understand the testimony of that day (383a, 384a). When he saw Armone on Thursday, June 10, Armone was toxic (386a, 387a). On direct examination the prosecutor asked Dr. Aufses whether Armone was disoriented at the hospital on the latter day, the answer being "not as far as I could determine" (379a); he found Armone responsive to his questions (380a). Not content with having extracted from Dr. Aufses these obviously guarder (if not grudging) answers supposedly favorable to the Government**, the prosecutor over-pressed Dr. Aufses and then received an even more guarded and qualified answer (380a):

"Q. Did you find that in your opinion, from your [3731] speaking to him that he understood what you

---

* Indeed, without awaiting Dr. Kostecki's post-verdict testimony, the Trial Judge rendered an oral opinion denying the motion for severance (429a-433a—details *infra*); and the Court of Appeals considered the record as it was before the Trial Judge when he denied the motion (slip opinion p. 2564, fn. 17, Appendix B hereto, *infra*), i.e., the Court of Appeals did not take Dr. Kostecki's testimony into consideration. In fact, Dr. Kostecki, had practically no knowledge about the case, was proceeding largely if not entirely on the basis of advice from another Bellevue physician, Dr. Donohue (*infra*), and was merely exercising a formal supervisory authority (Tr. 4297 et seq.; and see especially 429a).

** It must be remembered that this portion of Dr. Aufses' testimony relates to Thursday June 10 at Bellevue Hospital, not to any of the three court days with which we are here concerned (Wednesday June 9, Monday June 14 and Tuesday June 15).

were saying? A. He did. I thought he did. However, he was sick at the time. I felt that he was in pain, that there was a question from his general appearance that he was toxic at the time."

Dr. Aufses was giving the testimony here being described during the late afternoon of *Tuesday June 15*, at which time he found Armone "much improved physically over what he was when I examined him on Thursday afternoon [June 10]" (381a), and Armone had answered the few questions Dr. Aufses had just asked him on that late Tuesday afternoon (June 15) "perfectly logically and rationally" (381a). However, when asked about the intervening days, Dr. Aufses was unable to contribute anything other than that Armone had drained considerable pus on Friday June 11 which would make him begin to feel better "but it might take him a few more days to get back to his normal self" (382a); and while stating that at the time he was then testifying (late Tuesday afternoon June 15) he thought armone would be able to understand trial testimony and confer with his attorney, Dr. Aufses flatly declined to "venture an opinion as to yesterday [Monday June 14]" (383a-384a). On cross examination it was brought out that Dr. Aufses had told Armone's own physician, Dr. Rosati (*infra*), that he (Dr. Aufses) did not think Armone could go to court on Thursday June 10 and Friday June 11 and that he would not assume responsibility if Armone went to court; and when asked whether he had also told Dr. Rosati that if all tests at the hospital should prove negative Armone could go to court for no more than two hours a day, Dr. Aufses agreed that he "may have" so told Dr. Rosati (384a). These latter tests included X-rays, and Dr. Aufses pronounced the X-rays which were taken as being "Very inadequate" (384a, 385a). When asked whether a toxic condition affects a person's mental alertness, Dr. Aufses replied that "It may or it may not", and he repeated that he had no knowledge of whether

Armone had been able to follow the court proceedings on Monday June 14; *indeed he added that he also did not know whether on Tuesday June 15, up until the time he examined Armone which was late on that afternoon, Armone had been able to follow the court proceedings* (386a).

Dr. Robert E. Donohue, the Bellevue Hospital interne who had the principal medical contact with Armone at that hospital during the period in question, was called as a witness by the Government (Tr. 3920-3962).* Dr. Donohue had first seen Armone at the hospital Wednesday morning June 9 (Tr. 3921). Armone at that time "appeared to be in some distress and he was complaining of nausea and had been belching and had given a history of vomiting at that time" (Tr. 3922-3923). As regards Armone's having been released from the Bellevue prison ward to go to court that afternoon (still Wednesday June 9), Dr. Donohue stated that the decision to release Armone on that occasion was made by Dr. Kostecki, the senior resident in charge; Dr. Donohue was present at the time and Dr. Kostecki consulted with him before making the decision (Tr. 3922, 3926-3927).** Dr. Donohue further said there had been no change in Armone's condition from earlier that morning until just before he went to court; there was still nausea and belching (Tr. 3922). When asked whether Armone understood him in conversation just before going to court on Wednesday June 9, Dr. Donohue answered "I think he did, yes" (Tr. 3922-3923). Dr. Donohue again saw Armone

---

* The Joint Appendix unfortunately omits the most important portions of Dr. Donohue's direct examination (Tr. 3920-3936; 400a-403a); we shall therefore refer to the Transcript pages for this direct examination.

** As will appear, Dr. Donohue's participation in the above mentioned consultation with Dr. Kostecki could scarcely have been in favor of releasing Armone from the hospital, but the Government evidently chose not to explore this important point in its direct examination of Dr. Donohue.

Wednesday evening after his return from court, and Armone's condition had remained unchanged; when Dr. Donohue spoke to Armone at that time Armone understood what he said; this conversation was "just about a minute or so" (Tr. 3924).

Especially interesting was Dr. Donohue's testimony as to Armone's condition on the following Monday (June 14), Dr. Donohue stating that *"I would think on the following Monday he was in worse physical condition than he had been on Wednesday"*; and even more interesting, when asked to compare Armone's condition on Monday June 14 with that on the preceding Thursday—which, it will be recalled, was the day when the Bellevue authorities absolutely forbade the release of Armone to go to court—Dr. Donohue answered *"I think the condition was the same on Thursday of last week as it was on Monday of this week"* (Tr. 3929). The decision to send Armone to court on Monday June 14 was made, again, by Dr. Kostecki (after consultation with Dr. Donohue); when asked whether Armone was *examined* by Dr. Kostecki before thus being sent to court on Monday, Dr. Donohue's evidently ironic answer was, "he was *seen* by Dr. Kostecki" (Tr. 3927-3928) (emphasis supplied).* Before coming to court Monday morning June 14 Armone "was complaining of nausea, some dizziness, and he said he had vomited • • • there was vomitus at the bedpan at the bedside" (Tr. 3928). Thereupon Dr. Donohue gave Armone an injection of ten milligrams of Compazine, an anti-emetic from which "dizziness can be a side effect" (Tr. 3929-3930).

Apparently shaken by the foregoing direct testimony of his own witness Dr. Donohue, the prosecutor tried

---

* It will be recalled that Dr. Kostecki did not testify in this matter until after the jury verdict, by which time Judge Bonsal had of course already rendered his negative decision on the motion for a severence; and that the Court of Appeals declined to take Dr. Kostecki's testimony into consideration.

another tack. He asked Dr. Donohue whether Armone was in a toxic condition on Monday June 14, to which the witness replied unequivocally, "Yes, he was" (Tr. 3930). Desparingly the prosecutor then asked his doughty medical witness, "and yet he was released to come to court?", to which Dr. Donohue's terse reply was "Yes" (Tr. 3930-3931). The prosecutor then asked Dr. Donohue to explain what he meant by "a toxic condition", and the answer was, "Mr. Armone's condition was that of severe belching, nausea, and vomiting, and on both Thursday and Friday of last week and on Monday morning of this week he had these particular signs and symptoms" (Tr. 3931).

The prosecutor then took still another tack with Dr. Donohue, asking the witness for his opinion as to Armone's state of mental awareness before and after being in court on Wednesday June 9, the answer being "I don't think there was any change really in the condition" (Tr. 3931). The Court then interposed with a request for Dr. Donohue's opinion as to whether Armone knew what was going on in court Wednesday afternoon June 9, to which the answer was, "Well when I had spoken to Mr. Armone before leaving and upon his return he appeared at both times aware of his surroundings, et cetera, and that is as far as I would be able to go as to state what his condition was in the courtroom" (Tr. 3931-3932). The Court then asked Dr. Donohue's opinion as to whether Armone understood what was going on in the courtroom on Monday June 14, to which the Doctor replied (with commendable scientific objectivity in refusing to be drawn into an answer that would be unfair to Armone), that "Before he left for court in the morning he was complaining of nausea, dizziness and vomiting, as I stated, and when he came back he did appear to be in better physical condition and he was not complaining of symptomatology" (Tr. 3932-3932a).

Dr. Donohue further testified that Tuesday morning June 15 Armone "looked markedly improved" (Tr. 3933).

Dr. Donohue was next asked by the prosecutor about the tests done on Armone at the hospital (including a GI series), and whether the results of the tests indicated whether Armone would be fit to come to court or not, Dr. Donohue's answer being, "No, it had no determining qualities whatsoever" (Tr. 3935; and see Tr. 3933-3936).

Even more revealing was the defense cross examination of Dr. Donohue.* It emerged that the Government had taken a rather strong hand with the Bellevue hospital authorities during the period when Armone's illness was so undisputably grave that the hospital would not let him go to court (Thursday and Friday June 10-11). Dr. Donohue had told Armone's attorney, Mr. Lewis, about 3 o'clock Friday afternoon June 11 that X-rays of Armone were to be taken on the following Monday morning, but after Dr. Donohue spoke with the prosecutor (Mr. Jacobs) it was decided to take the X-rays that same afternoon (405a). Dr. Donohue next went on to testify as follows (405a):

> "Q. Didn't Mr. Jacobs tell you that he wanted Mr. Armone in court Monday morning? A. He suggested if he could possibly have him in court, his physical condition notwithstanding, yes."

Dr. Donohue further testified that a toxic condition "possibly could" make a person drowsy and cause headaches, and that he could not and did not know whether Armone was drowsy or able to follow the proceedings as alertly as the average person who was not ill on the days Armone was in court (406a-407a); and that he had not inquired of Armone how he felt while he was in

---

* Here we may refer to the Joint Appendix, which contains the entire cross examination.

court (407a). Dr. Donohue also replied "I couldn't state", when asked whether he could state with a reasonable degree of certainty that Armone could understand the court proceeding on Wednesday June 9 (407a). Dr. Donohue further testified that although Armone had been brought to the hospital on Tuesday June 8 in an ambulance, he had been given no medical treatment on that day and, as earlier noted, he was given no medication Wednesday morning before he went to court even though at that time he was toxic, had vomited, complained of pain and "was in a sick condition" (408a-409a). Dr. Donohue was then asked (409a-410a):

> "Q. I will ask you, sir, now as a doctor, if this was your patient would you permit him to go to court and sit in the courtroom in the condition he was? A. Probably not."

On re-direct examination, the prosecutor in an attempt to rehabilitate this witness because of the aforesaid answer, asked him:

> "Q. You testified that last Wednesday if Mr. Armone was your patient you wouldn't have permitted him to go to court, is that right? A. Yes.
>
> Q. Could you explain that? A. On the basis of severe belching, vomiting, I don't think that the—
>
> Q. That is—
>
> Mr. Lewis: Let him finish
>
> A. On the basis of the symptoms I would not have permitted him to go." (416a)

Dr. Donohue also testified further (on cross examination) as to the happenings of Monday morning June 14. He was asked, "Did Mr. Jacobs say to you that it is important that Mr. Armone be in Court this morning so that the trial "won't be delayed", and Dr. Donohue answered "Yes" (410a). Dr. Donohue told Mr. Jacobs that Mon-

day morning that Armone had complained of dizziness and had been vomiting and nauseous, whereupon Mr. Jacobs had asked him whether there was something he could give Armone "to allay those symptoms because we want him in Court" (412a). Mr. Jacobs had "suggested that if at all possible he would like Mr. Armone to be in Court on Monday morning" (413a).

On re-direct examination the prosecutor asked Dr. Donohue whether they had spoken together on Wednesday June 9 to which the doctor replied that he believed so, "I don't know"; and when the prosecutor asked "Did you tell me Mr. Armone was fit to come to Court Wednesday afternoon", Dr. Donohue said "Yes, sir" (416a)—even though, as previously seen, Dr. Donohue had testified on direct examination that if Armone had been his private patient he would not have let him go to Court on Wednesday; indeed, on re-cross examination (almost immediately after the "re-direct" item just noted), Dr. Donohue stated that he may have told Mr. Jacobs on Wednesday morning (June 9) that in his opinion Armone should not go to Court (417a-418a). The prosecutor also elicited on re-direct examination that on Monday, June 14, Dr. Donohue had stated it "was a possibility" that Armone was malingering. However, Dr. Donohue went on to clarify this as meaning that he had been speaking on the basis of observation of other patients in the past; he had never told Mr. Jacobs that Armone was malingering (416a-417a). This last makes it pertinent to mention that at the conclusion of the trial Judge Bonsal spontaneously declared to Armone "* * * you have been ill during the trial and not malingering" (545a).

Dr. Louis M. Rosati was called as a defense witness. He is Professor of Clinical Surgery at the New York University School of Medicine, director of surgery at the Columbus Hospital, and attending surgeon at Lenox Hill Hospital (361a). On January 3, 1964 at Columbus Hospital he operated on Armone, who had been shot through

the left lower chest. He had a perforation of the left diaphragm, perforations of both aspects of the stomach, a laceration of the head of the pancreas, a severance of one of the main arteries and a penetration of the right colon. He was confined to the hospital for three months. He was left with a chronic pancreatic abscess. The chronic pancreatic tract backs off or dams back occasionally, causing sepsis. When it backs up, Armone develops an undrained abscess which raises his temperature, makes him very toxic and requires drainage and supportive therapy (361a-363a). Dr. Rosati had spoken with Dr. Aufses of Bellevue who said that Armone was toxic, appeared to be disoriented,* sick with belching and occasional vomiting (363a). Dr. Rosati defined "disoriented" as being "not with it" (365a). Dr. Rosati also testified that Dr. Aufses told him he would not assume responsibility for Armone's coming to Court (368a). The Trial Court refused to permit Dr. Rosati to answer the hypothetical question whether a man who is "not with it" could sit in a courtroom for six hours and understand everything that took place in the courtroom (365a). This question was proper because it called for an expert opinion as to Armone's mental competence.

Armone testified as to his physical and mental condition. On Wednesday, June 9, he was vomiting, had pain in the open tract and severe headaches (389a). "A lot" of the testimony presented on Wednesday afternoon (June 9) "passed me right by" (389a), and as to the testimony on Monday (June 14) he was not able to follow "all of it" (391a). He was vomiting Monday (390a), and was in pain when he came to Court (391a). He was asked whether, when he has nausea and vomiting, he tends to get drowsy, and he answered "Yes, sir. I get a passing out feeling" (392a). On the morning of Tuesday June 15 he had nausea and pain (391a). He was asked whether on Monday and

---

*Dr. Aufses had denied telling Dr. Rosati that Armone was disoriented (379a).

Tuesday June 14-15 he had the "passing out feeling" and he answered "I had it on and off"; he was asked whether this prevents him from following the proceedings in Court, and he answered "Yes, sir" (392a).

The prosecutor cross examined Armone as to what testimony he had missed. Armone said "I don't remember what I missed", and that he did not remember who the witnesses were (424a). He did not recall at all the witness Zimbler (425a). He uncertainly recalled a part of the testimony of the witness Landi (425a). He recalled the witness Greenberg, who testified about a co-defendant's employment and earnings (425a). As to the testimony of narcotics agent Dugan, Armone remembered Dugan's taking the stand but "a lot of his questions and answers went by me" (425a). In fact, Armone had begun having trouble in following the testimony when he started to get his nauseous feelings about two weeks previously (426a-427a). He remembered co-defendant Viscardi on the stand but had missed part of the testimony (427a). As the prosecutor pressed him to tell whether he had informed his counsel of this difficulty in following the testimony, Armone stated "I don't think I did. I don't know. I would not recall, Mr. Jacobs. There is a lot of stuff that went on you could ask me for a million years, I would not know what went on here. I don't think I have even been on trial. * * * It is because I don't feel good" (427a; and see 425a-428a).

At the conclusion of the above testimony of Armone, which had followed that of Drs. Aufses, Donohue and Rosati, the prosecutor informed Judge Bonsal that when the matter of further medical testimony had been explained to Dr. Kostecki, the latter had stated, "Well, under those circumstances Dr. Donohue is the man who took care of this man" (429a). The Court expressed uncertainty as to whether it felt prepared to decide the motion for severance without hearing from Dr. Kostecki, and it deferred decision with the remark "I was not particularly satisfied with the testimony today" (429a).

The colloquy just described was had on Thursday, June 17, when the last of the testimony pertaining to Armone's illness was taken (Tr. 3762, 3976-3977). On the following day Judge Bonsal rendered an oral decision denying the motion for severance (Tr. 3978; 429a-433a), without having waited for the testimony by Dr. Kostecki; this oral opinion was rendered prior to the Court's charge to the jury on June 21 (437a *et seq.*). The Court noted that Dr. Donohue had thought Armone toxic on Wednesday, June 9 and also on Monday, June 14; and that "the doctors indicate" the same; "They all agree that the effects of this toxic condition may be vomiting and I think there was evidence that Mr. Armone did vomit. That he may have had headaches, he may be dizzy" (429a-431a). The Court also stated that "there seems to be no question at all that on Tuesday [June 15] Mr. Armone's condition was satisfactory" (431a)—a conclusion which is puzzling in view of the testimony, *supra*. The Court also noted that Armone himself had testified that on Wednesday, June 9 and Monday, June 4 "things passed him by" (431a); and the Court evidently thought it important to emphasize that Armone "did not raise the question at the time" (*ibid.*).* The foregoing were the Court's only findings or comments on the relevant medical aspects of the situation, and the Court then went on to announce what was evidently its *ratio decidendi* for denying the motion for severance, namely, that the testimony received during Armone's illness was from witnesses called by various defendants—the inference being (we take it) that any inability on Armone's part to follow or to understand such testimony did not result in any prejudice (432a). The Court concluded that "Under all these circumstances I do not see that any prejudice has resulted" (432a).

---

* As seen, Armone himself testified quite convincingly and indeed movingly, we think we may say that his failure to make an explicit issue of his mental disability at the time was but one further indication of his disabled and demoralized condition.

It is thus clear that the denial of the motion for severance was made in the face of the following: (1) The Trial Court found that all the doctors agreed that Armone was toxic on Wednesday, June 9 and Monday, June 14. (2) No doctor testified that Armone was able to follow the proceedings on those days, or on Tuesday, June 15. (3) Armone's testimony that he was mentally disabled at times during all three of those days is uncontradicted, and it is consistent with literally *all* of the medical testimony. (4) The Government was undeniably guilty of putting pressure on the Bellevue Hospital medical authorities to expedite Armone's return to Court in at least partial disregard of considerations of medical propriety if not sheer normal humaneness. (5) The physician who was in the best position to judge the situation, Dr. Donohue, the Government's own witness, was the witness who gave the strongest and the most emphatic testimony pointing to condemnation of the Government's pressures to have Armone brought to Court while he was ill. (6) Judge Bonsal made no finding that Armone was mentally competent during the times in question, but decided the matter, it seems, on the basis of the supposedly non-prejudicial nature of the testimony taken during Armone's illness. (7) The genuineness of Armone's illness, and its severity, are beyond question, Judge Bonsal himself having stated to Armone at the conclusion of the trial, as seen, "* * * You have been ill during the trial and not malingering" (545a). (8) An important factor in "rushing" this trial was the desire of a lady juror to go on a scheduled vacation cruise.

In the light of the above, the reasoning of the Court of Appeals in sustaining the denial of the motion for severance deserves special scrutiny for that reasoning is most strange (slip opinion, pp. 2563-2564, Appendix B hereto, *infra*). The Court of Appeals resolved the medical issue under the test of the Trial Court's exercise of discretion, *viz.*, on the basis that "at most there was a conflict of testimony" as to Armone's competence to stand trial and

that "despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence." We must respectfully state that these words of the Court of Appeals are incomprehensible in the face of the record. In our recitals of the medical testimony, *supra*, we have aimed at the fullest and fairest description, and we are sure that our description is proper. Where, in that testimony, is there one shred of support for the Court of Appeals' statements that "there was sufficient medical testimony to establish Armone's competence", or even for its statement that "there was a conflict of testimony"? No physician testified that Armone was competent; therefore, not only was there not "sufficient medical testimony" to that effect, but there was *no testimony* to that effect, so that there is not even "a conflict of testimony," either as between any of the physicians, or as between any physician and Armone himself on the issue.

Furthermore, since the Court of Appeals' decision is based, as just seen, solely upon its approval of a supposed exercise of discretion by the Trial Court on the medical proofs, it becomes of decisive importance (we respectfully believe) to point out once again that the Trial Court denied the motion for severance not on the question of medical competency but on the theory that the testimony received on Wednesday, June 9, and Monday, June 14 was not prejudicial. *The Court of Appeals did not take this into consideration at all,* or even mention it.

In any event, this conclusion by the Trial Court that Armone was not prejudiced by the testimony received during his illness is simply wrong as a matter of fact. The Armone defense had introduced testimony by Carlos Costantino, the owner of Lulu's Bar, to the effect that Joseph Armone had not been a visitor or habitue of the bar during the times as to which Hedges and Godwin testified having had various dealings there with Armone (Tr. 3219-3233).

Co-defendant Pacelli, on Monday, June 14 (when Armone was gravely ill) called Nicholas Calamaris as a witness; under vigorous prosecution by the prosecutor, Calamaris testified that he saw Armone at Lulu's Bar during 1959 and 1960 (Tr. 3362 *et seq.*). This testimony was extremely prejudicial to Armone for it impeached the testimony of Costantino. The prosecutor evidently considered this testimony of Calamaris to be of prime value for the Government, for on two occasions in his summation he engaged in emphatic oratory concerning it (Tr. 4084, 4101).

We have not been able to find any reported case which holds that the right of a defendant to be present at all stages of his trial, to comprehend the proceedings, and to confer with counsel, applies only when unfavorable testimony is being adduced. Every elementary consideration of the basic constitutional law of this subject of a defendant's right to be present at his own trial and to confront the witnesses, cries out against this novel theory of the Trial Court in the instant case. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Annotation*, 144 A.L.R. 199. Cf. *Shields* v. *United States*, 273 U. S. 583. If the situation is to be viewed as one in which the Trial Judge did here find the defendant mentally competent—i.e., if the case is to be viewed as one where the issue of mental competence was discretionarily resolved by the Trial Court against the defendant, rather than as a case where no adverse finding on that issue was (or could have been) made against the defendant and the motion for servance was denied on the dispositive basis that no prejudicial testimony was received during the defendant's illness—then the situation presented to the Trial Court in regard to the indubitable, grave and disabling illness of Joseph Armone was classically illustrative of the type of situation envisaged in *Dusky* v. *United States*, 362 U. S. 402, where, adopting the Solicitor General's phraseology, the Court stated that to support a finding of mental competency "the District Judge 'did need

more information than this record presents'. * * * it is not enough for the District Judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of facts' ". The Court went on to say that the " 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him' ". Accord: *United States* v. *Valentino,* 283 F. 2d 634, 635 (C.A. 2, 1960); *Pouncey* v. *United States,* 349 F. 2d 699 (C.A.D.C., 1965). And see *United States* v. *Kelly,* 349 F. 2d 720, 758-759 (C.A. 2, 1965).

We respectfully add that in the particular situation here presented there obtrudes, moreover, a due process question which may well transcend the importance of the question as to the conventional Fifth and Sixth Amendment wrongfulness of compelling Joseph Armone to sit through those portions of the trial during which his severe physical illness was impairing his abilities of mental attentiveness. The larger due process issue here is, whether the factor of the surprising inhumaneness on the part of the Government and the Trial Court in their respective overall courses of conduct regarding this undeniably very sick and suffering defendant, is a factor which (either independently or in conjunction with the abuse of judicial discretion in denying the motion for severance on the objective medical picture) demands due process condemnation as a matter of simple fairness and humane decency in the administration of Federal criminal justice. This larger due process issue is in this case because the case involves prosecutive and judicial "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.' " *Rochin* v. *California,* 342 U. S. 165, 172, 173.

II

This petition for certiorari brings before the Court, we realize, another in the tedious and seemingly endless series of Federal narcotics conspiracy convictions. The pattern here is classic—conviction on the testimony of accomplice witnesses who are persons of the vilest character. But in important respects our case departs from the tedious and dismal norm. We say this not only because "our" accomplice witnesses are even viler than the "normal" creatures of their species in prosecutions of this type, but for other reasons which are much more to the point as regards the fair administration of Federal criminal justice. One of our petitioners—Joseph Armone—has not even been convincingly inculpated by the accomplice witnesses (Hedges and Godwin); our other petitioner—Stephen Grammauta—is entitled at the very least to ask that the testimony of the sole witness against him (the accomplice Hedges) be weighted in scales of a more traditional calibre of justice than that which seems to have become the fashion in the lower Federal courts under the supposed "rule" that accomplice testimony need *never* be corroborated.

This supposed "rule", as we are about to show, is nothing more nor less than the result of an evolutionary process of misapprehension by various lower Feferal courts who have misread the controlling decisions of this Court on the subject. The true and correct (and the just) Federal rule, we shall show, is not that the dispensing with any requirement of corroboration of accomplice testimony is a "rule" of invariable application, but that it is the "better practice" to require corroboration. The circumstances of the present case call for the use of such "better practice" here.

The present trial record allows us to state unqualifiedly that the petitioners Armone and Grammauta have been convicted upon the uncorroborated testimony of the ac-

complice witnesses Hedges and Godwin. The only even ostensible "corroboration" of this accomplice testimony relates to the conspiracy as a whole, and it came primarily from still other accomplice witnesses. It is familiar that in jurisdictions or in cases where the accomplice-corroboration requirement is applied, accomplies cannot corroborate each other. E.g., *People* v. *O'Farrell,* 175 N. Y. 323, 67 N. E. 588 (1903). All of the so-called corroboration of Hedges and Godwin in this case—exhaustively recited by the prosecutor in his summation (Tr. 4055-4069, 4095)—related to one or another of the larger or general features of the alleged conspiracy as a whole, or to defendants other than Armone and Grammauta. Such general or unrelated forms of "corroboration" are insufficient as corroboration of accomplice testimony of the guilt of a particular defendant, under the familiar tests applied in jurisdictions which require corroboration. E.g., *People* v. *Kress,* 284 N. Y. 452, 31 N. E. 2d 898 (1941); *People* v. *Cohen,* 223 N. Y. 406, 118 N. E. 886 (1918), Re-arg. den. 227 N. Y. 623, 125 N. E. 921.

We are not even urging this Court to depart in any precedent-shattering way from what is commonly regarded as being the established Federal rule that corroboration of accomplice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the decisions noted, *infra,* that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by *proper* corroboration.

The contention which we are here urging was duly preserved in the Courts below. Counsel for defendant Pacelli, Mr. Kasanóf—requests and exceptions in this trial by each defendant were treated as being made by all defendants wherever appropriate (see, *e.g.,* Tr. 3715)—expressly requested an instruction to the Jury that accomplice testimony must be corroborated, and the failure so to charge was expressly excepted to by Mr. Kasanof

(on behalf of all defendants); indeed the Trial Court was expressly advised that the defense was deliberately aiming at a reopening of the prevailing Federal rule on this subject (see Tr. 3701-3703, 3712-3715, 3723-3724, 4201, 4207; and see Pacelli's request to charge No. 5). Also, counsel for Armone and Grammauta expressly requested an instruction (request No. 15) "that an alleged accomplice cannot corroborate the testimony of another alleged accomplice"; this last was also discussed with the Court in colloquy preceding the instruction to the Jury, when the Court indicated that it would not so charge (Tr. 3714). The point was also extensively briefed for Armone and Grammauta before the Court of Appeals (Point V).

Holmgren v. *United States*, 217 U. S. 509, 523-524, states that "It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been criticized, disparaged or departed from in any doctrinal sense by this Court in any other decision, including *Caminetti* v. *United States*, 242 U. S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said, "This is so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U. S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States*, 244 U. S. 432, expressly undertook to examine whether there had been corroboration of the accomplice testimony (at pp. 440-442). The *Valdez* case arose in the then Territory of the Phillippine Islands; from the report of the decision in *Valdez*, and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 *et seq.*), it does not appear that the

case involved any statutory or constitutional provision applicable to the Phillipines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.g., *Sykes* v. *United States*, 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States*, 209 Fed. 525, 533 (C.C.A. 8 1913); *United States* v. *Murphy*, 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis* v. *United States*, 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States*, 266 Fed. 1012, 1014-1016 D. C. App. 1920); *Wagman* v. *United States*, 269 Fed. 568, 572 (C.C.A. 6 1920); *Morenkow* v. *United States*, 276 Fed. 293, 294 (C.C.A. 6 1921); *Rudner* v. *United States*, 281 Fed. 516, 521 (C.C.A. 6 1922); *Rossi* v. *United States*, 9 F. 2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States*, 15 F. 2d 686, 689 (C.C.A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, *e.g.*, *Arnold* v. *United States*, 94 F. 2d 499, 501, 506-509 (C.C.A. 10 1938); *Stewart* v. *United States*, 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U. S. 779; *Gordon* v. *United States*, 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U. S. 862; *Smith* v. *United States*, 224 F. 2d 54, 60 (C. A. 5 1955); *Stanley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6 1957); *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8 1965); *Masters* v. *United States*, 351 F. 2d 105 (C.A. 8 1965).

Of the cases cited in the preceding paragraph we especially invite the Court's attention to the language of the Eighth Circuit in the *Sykes* case *supra;* and to the *Murphy* case from the Northern District of New York, *supra*. In the latter case, the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case, and to similar decisions of the lower Federal courts, said (253 Fed. at 406) that those cases do "not hold, as contended for by counsel, that corroboration of an accom-

plice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached." But when the accomplice witness has been impeached, the *Murphy* Court said, "The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *."

We submit that this stalwart and discerning language written in 1918 in the *Murphy* case, *supra,* embodies the correct historical and traditional perspective of the Federal accomplice-corroboration rule, and that it states a theme which this Court, at long last, should itself restate in an opinion on the merits of the instant certiorari application.

III

If the matter of overt act 10 and the alleged conversation about a counterfeit bill did not come before this Court in the humanly disastrous setting of criminal convictions with heavy jail sentences, one might content oneself with noting that what happened in the trial regarding this matter was really rather preposterous and that the subsequent positions taken by the Government and both of the Courts below are likewise preposterous. As it is, with petitioner Armone facing what will almost surely turn out to be a life sentence* (and with Grammauta serving an 8-year sentence), this is no case merely for droll reflections upon the eccentricities of the decisional processes in the lower Courts. The eccentricities in question unfortunately require serious attention indeed.

---

*In view of his age (48 years) and his physical condition.

The counterfeit bill item in relation to the overt act 10 problem arises, it will be recalled, (1) from testimony by Hedges and Godwin that after Godwin had obtained a $100 counterfeit bill from a gambling friend named Mickey and after this bill had been given by Godwin to Andy Dillon* at Lulu's Bar (where bookmaking was apparently going on), Joseph Armone reproached Hedges and Godwin that the counterfeit bill might lead to an investigation; and (2) from the fact that no such counterfeit bill item had been before the grand jury, so that the mistake in instructing the jury that overt act 10 involved the counterfeit bill incident meant also that a non-alleged overt act was *inadvertently* submitted to the jury and in an overall setting of much facual and instructional confusion. In short, petitioners, so far as may be known (since no one can know what the jury actually decided about overt act 10), may have been convicted on a charge not alleged in the indictment and without jury unanimity, and almost surely without jury rationality of decision. Even more serious, and ultimately dispositive as rendering the convictions invalid, is the point that in any event Joseph Armone's alleged expression of concern about the counterfeit bill incident could not possibly qualify as an "overt act in furtherance" of the alleged narcotics conspiracy.

The Trial Court admitted the testimony of Hedges and Godwin concerning the counterfeit $100 bill over strenuous defense objection; we contended that the subject of this testimony was improper as "other crimes" testimony and was not an overt act and not in furtherance of the conspiracy. See 316a-320a, 495a-496a, 501a-502a. In a narcotics conspiracy, the government must prove an unlawful agreement and an overt act committed pursuant to the agreement. *United States* v. *Agueci*, 310 F. 2d 817 (C. A. 2 1962), cert. denied 372 U. S. 959. Assuming *arguendo*

---

* Dillon is concededly not involved in the narcotics conspiracy charges herein.

that the passing of this counterfeit bill and the circumstances surounding it took place, and that it could be logically inferred by the Jury that Armone was concerned about a narcotics investigation, at the very most it could be admitted against him on the theory of knowledge. Knowledge of the existence of a conspiracy to violate the narcotics laws is not a crime. Knowledge is not an overt act. Cf. *Causey* v. *United States,* 352 F. 2d 203, 207 (C. A. 5, 1965).

Nor was Armone's alleged remark about fear of an investigation admissible on a theory of concealment of the conspiracy; it does not even remotely meet the test of *Grunewald* v. *United States,* 353 U. S. 391 in this respect. The Court below suggests (Appendix B hereto, *infra*) that the jury could have legitimately inferred that the purpose of the conversation concerning the counterfeit transaction was to warn Hedges and Godwin of the danger of exposing the narcotics conspiracy. But even if such an inference could legally be drawn (which we deny—see next paragraph herein) from a mere expression of worry over danger of investigation, it would still be necessary to link up such expression of worry with narcotics. The $100 counterfeit bill was in nowise connected with narcotics. One of the original two parties to the counterfeit transaction was not involved in the norcotics conspiracy. While Godwin was on the periphery of the conspiracy, Dillon had absolutely nothing to do with narcotics.

What of the fanciful theory that the counterfeit transaction was an overt act because if co-conspirators are warned to be on the alert, this constitutes an affirmative act of concealment. This theory—that Joseph Armone's alleged expression of worry about investigation was an "affirmative act of concealment"—is legally and logically unsound, i.e., even if Armone was talking about a narcotics investigation (which the record negates), such mere talking is not an "overt act" of "concealment". The very cases mentioned by the Court below are among the leading au-

thorities which deal restrictively with prospective efforts to enlarge the scope of conspiracy proofs by resort to such theories of "concealment". *Grunewald* v. *United States,* 353 U. S. 391; *Mount* v. *United States,* 333 F. 2d 39 (5th Cir.), cert. den. 379 U. S. 900; *Atkins* v. *United States,* 307 F. 2d 937 (9th Cir.). *Grunewald,* in particular emphasizes the intrinsically secret and furtive character of conspirators' activities and of their hopes to avoid detection, and *Grunewald* points out that to treat all such intrinsic conspiratorial furtiveness as overt acts of concealment would wipe out the statute of limitations and hearsay-restrictions in conspiracy cases. In our case no "act" of "concealment" is even involved. A conspirator who in effect says to colleagues, "I'm worried, fellows, that we may get caught" is not committing any "act" at all, much less an "act" of "concealment". There is no testimony that Armone told Hedges and Godwin even so much as to be careful, much less to suspend or more thoroughly conceal any narcotics activity, or to destroy or conceal any evidence, etc., as, *e.g.,* in the *Mount* and *Atkins* cases, *supra,* cited by the Court below.

The basic injustice of the way in which the overt act 10 problem has been administered by the Courts below cannot be fully appreciated without some additional reference to the procedural facts at the trial relating to this subject. The Court charged the jury that overt act 10 related to the counterfeit transaction (454a, 521a-522a, 528a). For reasons of statute of limitations, it further charged the jury that they must find the commission of one of the two overt acts 10 and 11 in order to find defendants guilty. This instruction was requested by the Government (535a). Nowhere in its instructions to the Jury did the Court charge the Jury as to any non-alleged overt acts which may have been proved in this trial; the submission to the Jury stands exclusively upon overt acts nos. 10 and 11.

The prosecutor, Assistant United States Attorney Howard Jacobs, submitted this case to the grand jury. He

did not submit any evidence to the grand jury about any of the counterfeit transactions. Mr. Jacobs prepared this case for trial. Mr. Jacobs filed a bill of particulars as to overt act 10, which did not refer to the counterfeit transactions, because overt act 10 as alleged in the indictment could not, in the absence of proof before the grand jury, pertain to the counterfeit transactions. Mr. Jacobs tried this case. He knew that overt act 10 did not apply to the counterfeit transactions. He never intended nor contemplated that the counterfeit transaction would become an overt act. If he had, he would have submitted testimony before the grand jury. If he had, he would have answered counsels' objections to the admissibility of the counterfeit transactions (*supra*) by contending that such evidence was admissible on the theory that they were overt acts in furtherance of the conspiracy. He never so contended.

Under all the circumstances, Mr. Jacobs knew or had to know that when the Trial Judge charged the jury on his own initiative that overt act 10 related to a $100 counterfeit bill, it was making a mistake. Government counsel had a duty to the Court to apprise it of the mistake being made. He had innumerable opportunities to help the Court rectify this error. The prosecutor, thoroughly conversant with every facet of the Government's case, cannot sit idly by and permit the Court to err because the overt act mistakenly charged may be stronger in content or otherwise somehow more advantageous to the Government than the one testified to before the Grand Jury (*infra*).

On July 8, 1965, after the jury verdict, the Court summoned counsel to advise them of a problem which had come to the Court's attention, after the verdict, to the effect that overt act no. 10 could not have been intended by the Grand Jury to relate to the alleged incident of the counterfeit bill because there was no testimony on that

subject before the Grand Jury and that overt act no. 10 instead must have related to an alleged conversation between Hedges and the defendant Joseph Armone in which the former made a request for more money. The Court stated that this alleged conversation "has perhaps more significance" than the alleged counterfeit incident, and that Hedges' Grand Jury testimony had been made available to defense counsel. The Court also remarked that "I think it is a mistake in which we all participated" (545a). See Tr. of July 8, 1965 (separately paged—docketed as R. 4676-4690), 549a-554a.

It is clear that an error did occur in the instructions to the Jury concerning overt act 10, in that the Jury were told this related to the alleged counterfeit bill incident, whereas the only item (if any) to which it could relate was the alleged conversation between Hedges and Joseph Armone about the former's request for more money. In view of the prominent use made by the Government of the counterfeit item (see the Government's summation at Tr. 4054, 4065, 4118), it is dubious, to say the least, whether the Hedges-Armone conversation about more money "has perhaps more significance", as the Court suggested (*supra*)—particularly since the latter item depended solely on Hedges' own basely discredited testimony.

In the proceedings on July 8, 1965, the Court intimated, as seen, that the defendants had not been prejudiced because "we all participated" in the mistake (545a).

We are sure that this Court's view with respect to this unusual occurrence is not going to be based on so simplistic a ground as that "we all participated" in the mistake, and that this Court will give consideration to the following questions which we respectfully deem to be determinative of the issue:

1. Can a verdict of conviction in a criminal case on a charge of conspiracy stand when the essential issue of statute of limitations was presented to the Trial Jury upon only two overt acts, one of which was con-

cededly not charged or intended to be charged by the Grand Jury, and where in the nature of the situation it is impossible to know whether the Trial Jury would have convicted if the improperly submitted overt act had not been submitted for their consideration?

2. Do the circumstances justify any conclusion of "harmless error", waiver or estoppel, where the Government itself (being obviously chargeable with correct knowledge of its own case) stood by and let the mistake be lodged with finality despite the intensive and repeated colloquies which were had concerning other factual details of overt act 10 during the instructions to the Jury*, where also defense counsel were not given *all* of the Grand Jury minutes and were deprived post-haste of the Hedges' Grand Jury testimony immediately upon the conclusion of Hedges' trial testimony, where also defense counsel had no reason to be alerted to any *total* absence from the Grand Jury minutes of testimony concerning the alleged counterfeit bill incident because for all they knew Narcotics Agent Dugan, for one, might also have testified on that subject before the Grand Jury (and they never got his Grand Jury testimony), and where even the Court itself did not discover the mistake until after the verdict?

The abortiveness worked by all of the above happenings in regard to the processes of fair and rational trial on the overt act issues of the indictment finds no "all fours" precedent. For decisions which in one way or another indicate disapproval of prosecutive procedures in conspiracy and other cases whereby conviction is obtained on the basis of matters not charged in the indictment, cf. *United States* v. *Negro*, 164 F. 2d 168, 171 (C.C.A. 2 1947); *Patterson* v. *United States*, 222 Fed. 599, 650 (C.C.A. 6 1915); *Thomas*

---

* See the petition for certiorari of co-defendant Pacelli herein, pages 33-41.

v. *United States*, 151 F. 2d 183, 186-187 (C.C.A. 6 1945); *United States* v. *Leggett*, 312 F. 2d 566, 573-574 (C. A. 4 1962); *United States* v. *Roach*, 321 F. 2d 1 (C. A. 3 1963).

As to the question of waiver or estoppel, cf. the recognition by this Court that "* * * trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus* v. *Balkcom*, 333 F. 2d 496 (C. A. 5th Cir. 1964) * * *." *Henry* v. *Mississippi*, 379 U. S. 443. See also *United States* v. *Puff*, 211 F. 2d 171, 180 n. (C. A. 2 1954), cert. den. 347 U. S. 963 ("* * * in a case such as this we should be reluctant—if not unwilling—to deem a substantial claim of error foreclosed by waiver of counsel"). To similar effect see *Williamson* v. *United States*, 332 F. 2d 123, 132 (C. A. 5 1964). *Bacino* v. *United States*, 316 F. 2d 11, 14 (C. A. 10 1963), collects the authorities for the familiar rule that if it is within the range of reasonable possibility that a trial error may have affected the verdict, the accused does not have the burden of showing an adverse effect.

In the Court below the Government contended that it is conceivable that the jury disregarded overt act 10 and found the defendants guilty on overt act 11. *United States* v. *Robbins*, 354 F. 2d 741 (C. A. 2, 1965), held, under analogous facts, that since it was impossible to ascertain the exact basis for the defendant's conviction, the conviction must be reversed.

In this hard-fought case where convictions and severe jail sentences have been obtained by the Government by means so dubious and even offensive as those portrayed under our Reasons I and II, *supra*, the chaotic disruptions and irrationalities which were imported into the trial processes of this case by the circumstances which we have treated under this Reason III, strongly favor the granting of certiorari to correct the grave maladministration of federal criminal justice which has here occurred.

Conclusion

Petitioners Armone and Grammauta respectfully adopt the points urged in the companion petitions herein, insofar as applicable to our case and consistent therewith. We also respectfully request leave to preserve, in the event of the granting of certiorari, the points presented in our Questions Presented no's. 5 to 8, inclusive.

It is respectfully submitted that this joint petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
Attorney for Petitioners,
Joseph Armone and
Steven Grammauta.

Appendix A

Judgment of Affirmance.

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and sixty-six.

Present: Hon. J. Edward Lumbard, Chief Judge.
Hon. Irving R. Kaufman,
Hon. Wilfred Feinberg,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Alfred Armone, et al.,
Defendants,

Joseph Armone, Stephen Grammauta, Vincent Pacelli, Nicholas Viscardi,
Defendants-Appellants.

Appeal from the United States Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

Appendix B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—September Term, 1965.

(Argued March 4, 1966 Decided July 8, 1966.)

Docket No. 30135

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH ARMONE, STEPHEN GRAMMAUTA, VINCENT PACELLI, and NICHOLAS VISCARDI,

Appellants.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN, *Circuit Judge,* and FEINBERG, *Circuit Judge.**

Appeals by four appellants from judgments of conviction for violation of the federal narcotics laws, 21 U.S.C. §§ 173, 174, after a trial by jury before Dudley B. Bonsal, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

JEROME LEWIS of Brooklyn, N. Y., *for defendants-appellants Armone and Grammauta.*

---

* Argument heard as District Judge, sitting by designation.

Appendix B.

E. BARRETT PRETTYMAN, JR. of Washington, D. C. (Robert Kasanof and Albert J. Krieger of New York, N. Y., on the brief), *for appellant Pacelli.*

EDMUND A. ROSNER of New York, N. Y. (Edward Cherney, on the brief), *for defendant-appellant Viscardi.*

ROBERT G. MORVILLO of New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Howard L. Jacobs, Otto G. Obermaier, John S. Allee, on the brief), *for appellee.*

FEINBERG, *Circuit Judge:*

Four defendants appeal from convictions of violating the conspiracy provision of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The single-count indictment named twenty-eight co-conspirators, twelve of whom were charged as defendants. The trial was originally scheduled to begin on April 27, 1965, with eight of the named defendants; the remaining four had not yet been apprehended. On that morning, two of the defendants became fugitives, requiring a one-week continuance. The trial of the other six defendants began on May 3, 1965 before Judge Bonsal and a jury.[1] On June 22, 1965, the jury convicted appellants Joseph Armone, Stephen Grammauta, Vincent Pacelli and Nicholas Viscardi, and acquitted Alfred Armone and Alexander Schoenfeld. On July 29, 1965, Judge Bonsal sentenced Joseph Armone to fifteen years, Grammauta to

---

[1] The six remaining defendants were severed.

eight years, Pacelli to eighteen years, and Viscardi to five years.[2] We affirm the convictions as to all four appellants.

Since the main arguments in this court are not directed to the sufficiency of the evidence, the facts developed at the seven-week trial will not be outlined in detail.[3] Viewing the government's case after a jury verdict of guilty in the light most favorable to the prosecution, as we must, it was, briefly, that appellants, together with the co-defendants and co-conspirators, conspired from 1956 through 1960 to import and distribute heroin in the United States. The drugs originated in France, and would be smuggled into this country with the aid of couriers, who usually travelled as part of their occupations. For example, Clarence Aspelund, a seaman, would transport heroin for exporter Marius Aranci in Marseilles, and Charles Bourbonnais, a flight purser, would bring in the drug for Felix Barnier in Paris. Mauricio Rosal, a Guatemalan ambassador, and Etienne Tarditti, a French businessman, also acted as couriers for Barnier.

The couriers intially delivered the drugs, once in this country, to Joseph Cahill, whose base of operations was New York City; eventually, Charles Hedges and Nicholas Calamaris took Cahill's role. Joseph Armone, one of the importers, would direct the eventual sale of the drugs to domestic wholesalers Vincent Pacelli and Michael Ricucci. Stephen Grammauta and Arnold Romano were also importers. Nicholas Viscardi acted as a storer of the narcotics pending delivery to wholesalers.

---

[2] Pacelli and Armone were also fined $20,000.

[3] Appellants do contend, in urging reversal, that the evidence disclosed multiple conspiracies, rather than a single conspiracy, and therefore they were not connected up with the alleged single conspiracy. This point will be discussed *infra*.

Appendix B.

Many transactions were detailed at the trial. In 1956, Aspelund met Cahill in New York, and thereafter reported to his principal (Aranci) that Cahill had requested narcotics. A six or eight kilo delivery, by way of Norfolk (because of complications in the New York harbor), was the fruit of this meeting. For the next three years Aspelund would bring in heroin for Cahill about three times a year. Bourbonnais would also bring in narcotics for Cahill, several kilos at a time; both couriers were paid by Cahill. Hedges, meanwhile, became a domestic deliverer for the latter, and was introduced to the conspirators' rendezvous at the Amvets Club; he was eventually promoted to direct dealings with the couriers.

Heroin from Pierre Roulet, an airline steward, would be taken by Hedges at first to Cahill's apartment, and later on to his own, where it would be picked up by Viscardi. Hedges would also deliver to various automobiles under the control of conspirators. In 1958, Hedges was introduced to Pacelli, and arrangements were made for deliveries directly to him by Hedges. In November 1958, Hedges made a delivery to Grammauta, who drove off with Viscardi.

On occasion, Hedges would meet with Joseph Armone at the Amvets Club to discuss some aspect of the dealings with the exporters' couriers. Payments from wholesalers were often turned over to Armone or Grammauta by Hedges, as the latter became involved in sales by the importers. Pacelli would sometimes furnish an automobile for Hedge's transportation. Hedges would pick up heroin at Viscardi's apartment, where it had been stored, for delivery to wholesalers, and he became a liaison between Armone and Pacelli. James Godwin, referred to in testimony quoted below in connection with the overt act problem, was Hedges' cousin; Godwin was often a witness to parts of the transactions involving Hedges and Pacelli.

Appendix B.

During a lull in 1959-1960, Armone told Hedges that they would "get started" soon after a few things were "straightened out." Activity began again in February 1960, when Pacelli asked Hedges if he could obtain some heroin. Hedges relayed the request to Armone, who complained that Pacelli was not paying in advance, or a high enough price. Armone eventually relented and the transaction was consummated. A few months later, Hedges demanded more money from Armone for himself; the latter authorized an extra $50. In the fall of 1960, certain couriers were arrested; Hedges was convicted in the District of Connecticut in March 1961.[4] Godwin saw Armone that month in an attempt to raise collateral for Hedges's appeal bond. Armone said that he had no money; a few months later Godwin pointed out that unless Hedges was given some help, as in raising bail, he might cooperate with the government. Armone said that another conspirator had gone to prison and "kept his mouth shut and Charlie could do the same." In September 1964, the indictment in the present case was filed, and Hedges became the prosecution's leading witness.

The four appellants make various contentions on appeal. Their arguments will be considered, under the name of the defendant primarily pressing the point. These points raised by defendant Pacelli will be dealt with first; thereafter, to the extent that they have not already been covered, the arguments of Armone and Grammauta, made jointly, and Viscardi will be considered.

I. Pacelli

§ 174 *Inference*

Pacelli first argues that the trial judge's handling of the statutory inference set forth in 21 U. S. C. § 174 violated

---

[4] *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

his rights under the Fifth and Sixth Amendments. The words of the statute are:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

This provision was held constitutional over forty years ago. *Yee Hem* v. *United States,* 268 U. S. 178, (1925); see *Orozco-Vasquez* v. *United States,* 344 F. 2d 827, 829 (9th Cir. 1965). *United States* v. *Sorenson,* 330 F. 2d 1018, 1021 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965). Referring to this section, Judge Bonsal told the jury that:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
>
> • • • • •
>
> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that they have not offered an explanation as to their possession. You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally

imported into the United States unless he has given you a satisfactory explanation of his possession.

Pacelli did not testify at the trial.[5] He first claims that this charge was an adverse comment on his failure to take the stand, depriving him of his Fifth Amendment rights not to be compelled to be a witness against himself and of due process. Pacelli also argues that the charge created a presumption against him because he did not take the stand and thereby violated 18 U. S. C. § 3481.[6] Appellant relies heavily on the recent Supreme Court decision in *United States* v. *Gainey*, 380 U. S. 63 (1965). That case dealt with a provision in the Internal Revenue Code, which the Court recognized as similar to section 174. *United States* v. *Gainey, supra* at 64-65 n. 2. The Code provides that the presence of a defendant at a site where the business of a distiller is being carried on unlawfully is sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury." Int. Rev. Code of 1954, § 5601(b)(2). In affirming the conviction of defendant Gainey, the Court upheld a charge similar to that given by Judge Bonsal and specifically rejected the contention that the charge could "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey, supra* at 70-71. Similarly, in *United States* v. *Secondino*, 347 F. 2d 725 (2d Cir.), cert. denied, 382 U. S. 931 (1965), this court, relying on *Gainey* reached a similar conclusion with respect to section 174. See also *United States*

---

[5] Neither did appellant Armone.

[6] In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

v. *Christmann*, 298 F. 2d 651, 652-53 (2d Cir. 1962) (dictum); *Williams* v. *United States*, 328 F. 2d 256, 262 (8th Cir.), cert. denied, 377 U. S. 969 (1964).

Pacelli seeks support not from the holding of *Gainey*, but from its advice that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." *Id.* at 71 n. 7. We agree that this would be the better practice and suggest it be followed in the future. But the holding of *Gainey* is that mention of the statute does not require reversal so long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71. Defendant counters that Judge Bonsal, unlike the trial judge in *Gainey*, failed in this command because he did not make it clear that a defendant was not required personally to testify and that the "explanation" could come from other evidence in the case. Pacelli urges with some force that the government's own request for charge would have told the jury that the explanation could have come from "the evidence in the case." However, Judge Bonsal did charge later in his instructions, after noting that cer- did charge later in his instructions, after nothing that certain defendants had testified, that:

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them or as any basis of any presumption or inference unfavorable to them. You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Somewhat earlier he had charged:

> Now, I mention these two defendants purely by way of example and for nothing else, because you will review the evidence and consider what reasonable inferences you find may be drawn therefrom with respect to each of the six defendants. As I said, it is for your determination what reasonable inferences may be drawn from the evidence. But I remind you again that after considering all of the evidence as to a particular defendant you find that two reasonable inferences may be drawn, one consistent with his innocence and one consistent with his guilt, you must acquit the defendant . . .

It would be hypertechnical, in the face of these instructions, to convert a general and accurate explanation of the section 174 permissible inference into a comment on defendants' failure to take the stand.[1] Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference."

Allegedly prejudicial publicity

Appellant Pacelli next contends that publicity destroyed his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), and, in federal trials, buttressed by the supervisory power, see *Marshall* v. *United States*, 360 U. S. 310 (1959). The errors specifically claimed are denials of motions for

---

[1] In the portion of the charge dealing with the statutory inference, it would again be wiser practice to state also that the "explanation" can come from any evidence in the case and that the total evidence should be considered.

a change of venue, a continuance, a mistrial, and an examination of the persons responsible for the publications here involved.

Pacelli was indicated on September 30, 1964. On January 11, 1965, the front page of a New York City newspaper with a large circulation featured a photograph of a young woman in what appears to be lingerie, and the banner headline FEAR MOB SLEW DOPE BIG'S GIRL. Bold face type over the caption asked Was She Killed To Seal Her Lips?[8] On page three appeared a banner headline and a sub-headline: Fear Dope Big's Girl Was Rubbed Out [and] Dancer Talked to Grand Jury And Promptly Vanished. There was another eye-catching picture of the young lady.[9] On

---

[8] The caption stated, in part:

> Nancy Sue Shelton . . . is missing. Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with. Nancy disappeared three months ago . . . after testifying before a grand jury looking into dope smuggling. Her boyfriend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance. . . . Story on page 3

[9] The story said, in part;

> But Nancy Sue hasn't been seen for more than three months now, and the feds believe she is dead. Murdered—because she knew too much.
>
> * * * * *
>
> She was Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic.
>
> 200 Million Dope Ring
>
> Federal narcotics agents said that Pacelli was a member of a ring which smuggled more than $200 million worth of dope into the U. S. over a five-year period, even using Mauricio Rosal . . . as a courier. Rosal is doing a 15-year stretch.
>
> On Sept. 23, agents had Pacelli under surveillance at Lexington Ave. and 73d St. when Nancy Sue drove up in a taxi.

(Footnote continued on following page)

January 12, another article on the subject appeared in the same newspaper under a prominent headline (Dope Mob Ordered Nancy Sue to Scram) on page five. Both stories identified Pacelli as the missing girl's boy friend "who trafficked in narcotics."

Pacelli also points to a magazine article published approximately mid-way through the trial. The article appeared in a semi-scientific magazine addressed to laymen, with a national circulation of one and one-third million copies. Its contents are divided into departments, of which "Cars and Driving," "Home and Shop," and "TV, Radio and Electronics" are representational. In the June 1965 issue (apparently published about June 1), there appeared a six-page article, not referred to on the cover, but listed in the inside table of contents under "Special Reports." The article began mid-way through the issue, and was entitled "Our top anti-narcotics agent tells the inside story of how three nations combined to fight [the following in large type] The Dope-Smuggling Diplomats." The article is by-lined "by Henry L. Giordano as told to James C. G. Conniff." Mr. Giordano is identified under his photograph as Commissioner of the United States Bureau of Narcotics.

(Footnote continued from preceding page)

Pacelli, 43, of 422 E. 118th St., paid her fare and helped her out of the cab The couple strolled on 73d St. to Third Ave. There, the agents took Pacelli into custody on a narcotics charge.

* * * * *

[Nancy Sue failed to return before the Grand Jury to finish her testimony shortly thereafter, the story continues.]

The day after Nancy Sue testified the feds caught up with a longtime fugitive . . . a business associate of Pacelli.

The authorities said the underworld assumed Nancy Sue talked and that others might be nabbed if she talked some more.

* * * * *

If by remote chance you see her, let the government know. Your anonymity will be protected.

Appendix B.

The article describes the smashing of a narcotics smuggling ring which utilized diplomats as couriers, and is written in a popular, although unsenational, style. It identifies and has photographs of seven co-conspirators who were named in the indictment in the instant case, including one witness at the trial, and also names defendant Cahill (who was servered). The article did not mention any defendant tried below. On the day of publication, motions for a mistrial were made based on the article. The motions were denied, as was a later motion to vacate the verdict which was based in part on allegedly prejudicial publicity.

Since argument of this case, the Supreme Court has handed down its opinion in *Sheppard* v. *Maxwell,* —— U. S. —— (1966). In considering the question of prejudicial publicity here raised, we have carefully read the *Sheppard* case and take as our governing standard the following (*id.* at):

> Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

In *Sheppard,* the barrage of publicity reached carnival proportions, the jurors were "without adequate directions not to read or listen to anything concerning the case," there was no doubt that "this deluge of publicity reached at least some of the jury," "bedlam reigned at the courthouse," and the arrangements between the court and news media "caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.'" The Supreme Court

stated that the basic reason for vacating the conviction was that the trial judge "did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.* at

None of these conditions can fairly be found in this case. There was no barrage of publicity. Complaint is made only of the publications described above. The two newspaper articles appeared on successive days in January, sixteen weeks before trial. Thereafter, until the June 1 magazine article, apparently nothing was written or said in the news media which would cause defendants to complain. A good part of this is undoubtedly due to the commendable foresight of the trial judge. A month before the trial, he asked the United States Attorney (with the concurrence of defense counsel) to request local news media not to publicize the trial. See *United States* v. *Bentvena*, 319 F. 2d 916, 934 (2d Cir.), cert. denied, 375 U. S. 940 (1963). The jurors were adequately and periodically warned not to read or listen to any accounts of the case in the media, and, in conducting the voir dire about the publications, the judge carefully walked the tightrope between exploring the jurors' knowledge and titillating their curiosity about material previously unknown to them.

Finally, we cannot fairly say, as the Court did in *Sheppard*, that there is no doubt that the publicity reached "at least some of the jury."[10] As to the magazine article published during the trial, the court below promptly inquired of the jury as follows:

> Before we adjourn for the day I would just like to tell you, you remember, I had been mentioning to you every day about any possible articles, radio or

[10] All jurors but one had read about the case in the newspapers or heard broadcasts about it. —— U. S. at ——.

Appendix B.

TV programs. My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have heard in the course of the trial. And since that has been brought to my attention, I would just like to ask each of you whether you have seen that article?

Well, now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

We see no reason to disbelieve the jurors' negative response regarding an article which had just been published in a magazine of somewhat limited appeal. As to the newspaper articles published before trial, at the beginning of the trial the court conducted a detailed voir dire which included the newspaper reading habits of the prospective jurors. The judge asked all members of the panel to advise him if they had read or heard anything about narcotics in general which would interfere with their ability to render a fair and impartial verdict, and if they had read anything in the press or heard anything relating to the defendants on trial, and received negative responses. Eight of the jurors finally selected were asked which newspapers they read; two said they read the newspaper involved, and one said he read "most of them." Each juror was asked whether he knew of any reason preventing him from rendering a fair verdict, with a negative response in all cases. No objection appears to have been taken after the voir dire regarding the failure specifically to ask four of the jurors which newspapers they read. The newspaper articles appeared some

sixteen weeks before trial. We regard this time lag between publication and trial as most significant. As we recently had occasion to say:

> [T]he situation here is in no way comparable to that in *Marshall* v. *United States, supra,* where the Court reversed a conviction for unlawfully dispensing drugs where it was shown that seven jurors had been exposed to news articles which disclosed the defendant's prior criminal record and other information after the same material had been excluded from the trial by the trial judge. By direct contrast, the adverse publicity in the present case appeared several months prior to the trial and the importance of this time-lag cannot be overlooked. Both the Supreme Court and this court have indicated that the length of time between the publication of adverse publicity and the empanelling of the jury is a significant factor in assessing claims of prejudice resulting from pre-trial publicity. See *Beck* v. *Washington,* 369 U. S. 541, 556-558 (1961); *Stroble* v. *California,* 343 U. S. 181 (1952) (six weeks); *United States ex rel. Brown* v. *Smith,* 306 F. 2d 596, 603 (2d Cir. 1962), *cert. denied,* 372 U. S. 959 (1963) (three months). Since the articles involved here were twelve weeks old at the time the jury was empanelled, it is highly unlikly that they were retained in the memories of the jurors. As Judge Weinfeld has pointed out, it is a fact that "frequently in this large metropolitan district prospective jurors show little recall of past widely publicized matters . . ." *United States* v. *Kahaner,* 204 F. Supp. 921, 924 (S. D. N. Y. 1962).

United States v. *Bowe,* —— F. 2d —— (2d Cir. 1966).

Whether publicity is so prejudicial as to require a new trial is ordinarily committed to the trial judge's discretion.

"Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall* v. *United States*, 360 U. S. 310, 312 (1959). Under all of the circumstances of this case, including the time of the publicity, the steps taken by the trial judge to curb its effect on jurors, his careful exploration of its impact and the response of the jurors, we do not feel that the court below committed error. We do not believe a contrary result is required either by *Sheppard* or the cases cited in Pacelli's brief. We have already discussed the former; as to the latter, *Irvin* v. *Dowd*, 366 U. S. 717 (1961), involved a trial which "had become the *cause celebre*" of a small community. Eight of the twelve jurors selected thought petitioner was guilty in advance of trial. In *Marshall* v. *United States, supra*, several jurors read, during the trial, articles disclosing other crimes by petitioner. Here, of course, there is no evidence that jurors had read, much less remembered, the particular articles. *Estes* v. *Texas*, 381 U. S. 532 (1965), was another *cause celebre* involving a televised trial, and *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), involved a televised confession viewed by several members of the jury. The other authorities cited to us are equally distinguishable.

Overt act 10

The next asserted error is the treatment of an overt act, number 10 in the indictment. We note at the outset of discussion of this issue that the narcotics statute here involved contains a conspiracy provision which, unlike the general conspiracy statute, 18 U. S. C. § 371, does not in terms require the doing of "any act to effect the object of the conspiracy." One district court has concluded that an overt act need not be proven under 21 U. S. C. § 174.

Appendix B.

United States v. *Gardner* (202 F. Supp. 256 (N. D. Cal. 1962); *cf.* Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 948 (1959). As the government does not urge this ground, and as we believe the trial court committed no error in instructing the jury regarding the overt act, we do not think it necessary to explore this issue.

Of the eleven acts alleged in the indictment, only two were submitted to the jury; the trial judge held that the statute of limitations barred consideration of the other nine. The indictment alleged as overt act 10 that "in or about March of 1960," Joseph Armone was "in the vicinity of 122 Second Avenue, New York, New York." Thereafter, the government in a bill of particulars specified the act as taking place "during March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City." 207 Second Avenue was, of course, a different address from that specified in the indictment—122 Second Avenue.

At the trial, there was evidence that in April or May 1960, Hedges had a conversation with Armone in Lulu's Bar (conceded here to be located at 207 Second Avenue) during which Hedges complained about the amount of his payments. There was also testimony of a conversation between the same persons at the same place and some time in the same months concerning a counterfeit $100 bill passed by Godwin, Hedge's cousin and one of the co-conspirators. Hedges testified that in Lulu's Bar Joseph Armone told him that a counterfeit $100 bill given "them" by Godwin would cause trouble in the form of an investigation. Godwin gave testimony corroborating this conversation.

During his charge, Judge Bonsal read the allegation of overt act 10 in the indictment and stated:

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act

number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges and Godwin concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

After some deliberation, the jury requested that the testimony relating to overt acts 10 and 11 be read to them. Thereafter, pursuant to agreement of the parties, the judge read to the jury in connection with act 10 the testimony of the conversation at Lulu's Bar concerning the counterfeit bill. As already noted, it is conceded here that Lulu's Bar is at 207 Second Avenue. The judge also again read the allegations of the indictment regarding act 10. It will be recalled that this referred to Armone's being in the vicinity of 122 Second Avenue. More deliberation followed, and then the following note came from the jury:

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to re-hear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.
>
> These two locations are five blocks (approximately) apart.
>
> Can these [scratched out]
>
> [over]
>
> Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another, separate event?
>
> Respectfully,
>
> C. Burquist

The court thereupon told the jury that "everything you say here is exactly the truth" and that it was for them to determine whether 122 Second Avenue is in "the vicinity of" Lulu's Bar and the restaurant across the street. The jury was told to use its common sense. At no point did any defendant claim that the testimony concerning counterfeit money did not bear on overt act 10 or object on the ground that overt act 10 was in fact something different. In fact, as indicated above, defense counsel cooperated in selecting the testimony to be read to the jury.

A few weeks after the verdict, the trial judge summoned counsel to tell them he had learned that there had been no testimony relating to the conversation about the counterfeit bill before the Grand Jury. The judge believed that the Grand Jury in alleging overt act 10 had apparently intended the conversation in which Hedges asked for higher payments (that conversation also took place at Lulu's Bar at 207 Second Avenue). The judge thought it was "a mistake in which we all participated."

From this relatively simple set of circumstances and a trial judge's effort to bend over backwards to be fair, defendants have spawned a bewildering array of contentions, some of them inconsistent with each other. Pacelli's will be considered first. He first argues that the jurors' note meant to ask whether the "vicinity" of 122 Second Avenue can be said to include 122 Second Avenue itself. His theory is that the jury, having heard still other evidence concerning events at that address,[11] and not knowing of the bill of particulars specifying 207 Second Avenue, thought that perhaps 122 Second Avenue could not be deemed (in law) to be in the vicinity of itself, and wanted to know. If this

[11] There was testimony, not referred to above, that the Amvets Club at 122 Second Avenue was the scene of many events referred to in the evidence.

interpretation is correct, Pacelli continues, the judge's response could only be confusing because it focussed on a conversation at 207 Second Avenue. We think that this interpretation of the jury note—which was never raised below—does not rise to the level of "strained." The note explicitly refers to "two locations," including Lulu's Bar (which is at 207 Second Avenue), and their distance apart, and asks whether 122 can be thought of as "the vicinity," or whether it is the location of a different event. The note could only be interpreted reasonably as asking for the definition of "vicinity" vis-a-vis the two locations. If anything, by eliminating the possibility raised by Pacelli that the jury might tie up overt act 10 to other testimony of events at 122 Second Avenue, the trial judge helped, rather than harmed, defendants. Appellant argues that the possibility of confusion remained, thereby vitiating the verdict. However, the jury's note makes clear that it was following the testimony closely and was focussing sharply on the limited issue the trial judge had left with it.

Pacelli also claims he was deprived of a unanimous verdict because jurors might agree that act 10 was proven for different reasons; *i.e.*, some might consider events at 122 Second Avenue, while others might find the conversation at 207 Second Avenue occurred. Armone and Grammauta similarly argue that the court refused to charge that the jury had to agree unanimously on one or the other of the overt acts submitted to it, and not merely agree that an overt act had been proven. Whether this fragmentation of the unanimity requirement is impermissible need not be explored. As for Pacelli's claim, the judge's reply to the note in effect eliminated this possibility from the case. As for Armone and Grammauta's argument, the court's charge that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 and 11, in fact,

took place . . . Now, if you find beyond a reasonable doubt that at least one of these two overt acts, 10 and 11, was committed," coupled with his instruction that the verdict be unanimous, adequately answers this objection. "You" and "your" obviously refer to the jury as a body; any supposition that the jurors would take the instructions to mean that they can fragment their findings on the elements of the offense (taking overt acts *arguendo* to be "elements" in this context) is strained conjecture.

Accepting the correct interpretation of the jury note *arguendo*, Pacelli next contends that there was no evidence of the distance between 122 and 207 Second Avenue, and the subject was not one that the jury could notice; hence, the jury either guessed at the distance or took a view, both of which courses are impermissible. Therefore, there was no way the jury could decide vicinity *vel non*, and the issue as to act 10 should not have gone to the trier of fact. This argument was again not made to the trial judge at any time and for that reason, among others, cannot prevail here. In fact, appellants did not object to the court's endorsement of the jury's supposition as to the distance between the two places by telling it "everything you say here is exactly the truth."[12] In addition, there was sufficient evidence from which the jury could approximate the distance between the Amvets Club and Lulu's Bar as five blocks.[13]

---

[12] Appellants did urge the judge to take the entire issue from the jury as a matter of law.

[13] Despite the statement in Appellant Pacelli's Brief, p. 67, that "a search of the transcript reveals that *no testimony was presented from which the jurors might infer the distance between these two addresses*" (emphasis in original), there is at least the following in the record: Hedges testified that the address of the Amvets Club was 122 Second Avenue. Joint Appendix ("JA"), pp. 84a, 90a,

(*Footnote continued on following page*)

Appendix B.

The other appellants apparently argue that as a matter of law 207 and 122 Second Avenue could not be in the same "vicinity" and therefore the issue should not have been submitted to the jury. This position is incorrect. Moreover, any error committed by the trial judge did not harm defendants. The sequence of events shows that there was here nothing more than an immaterial variance between the indictment and the proof—the indictment charging 122 Second Avenue and the proof showing 207 Second Avenue—and appellants were aware of the variance over six weeks before the trial began. See *United States* v. *Ansani*, 240 F. 2d 216, 223 (7th Cir.), cert. denied, 353 U. S. 936 (1957) (variance between Chicago and Cicero, Illinois, held immaterial); *Strauss* v. *United States*, 311 F. 2d 926, 932 (5th Cir.), cert. denied, 373 U. S. 910 (1963); *United States* v. *Glaze*, 313 F. 2d 757 (2d Cir. 1963). Therefore, the judge could have instructed the jury that the proof of act 10 did not specifically conform to the charge in the indict-

(*Footnote continued from preceding page*)

94a, 156a. He also testified that Lulu's Bar was at 13 Street and Second Avenue. *Id.* at 157a. Godwin testified that the bar was on 12 Street and Second Avenue. *Id.* at 220a. Sol Gold testified that he lived "at Second Avenue and 4th Street, 65." Record, p. 3600. Aspelund testified that the Phoenix Bar was on Second Avenue, between 12 and 14 Streets, JA, p. 197a, and on cross-examination stated it was between 10 and 12 Streets. Record, p. 1812. When asked "you gave the address [of the Phoenix Bar] 180 Second Avenue," Aspelund replied "I got it in France" (although he later professed not to have paid attention to the address at the time in question). *Id.* at 1812-18.

Knowing that 65 Second Avenue was at 4 Street and that 180 Second Avenue was between 10 and 14 Streets, the jury could reason that, in the area of Second Avenue in question, there were about 10 or 20 house numbers per block. This would locate the Amvets Club between about 6 and 12 Streets, or up to seven blocks from Lulu's Bar. Depending on what testimony as to various addresses was believed, the jury could easily have placed the distance between the club and the bar at "five blocks (approximately)," which is what it did.

ment but that the variance was immaterial. He could have gone on to say that if the jury believed that the conversation about the counterfeit bill took place at 207 Second Avenue in March or April of 1960, the prosecution had fulfilled its burden as to act 10.[14] Therefore, the judge created an additional issue of fact in his instruction that the jury consider whether 122 and 207 Second Avenue were in the same vicinity, and any error was not only harmless, but was beneficial to appellants. Pacelli also argues that the jury should have been instructed that different non-adjacent addresses are not in the "vicinity" of each other. "Vicinity" has been defined as "a surrounding area or district." Webster's Third New International Dictionary 2550 (1961). No one seriously contends that the jury had an erroneous idea of the approximate distances involved. Its note asserted that the distance was "five blocks (approximately)" and even appellant Pacelli's brief says no more than it is "closer to six blocks apart and on opposite sides of the street."

Appellants have three further major thrusts based on overt act 10: (1) the absence of any Grand Jury testimony about the counterfeit bill conversation was fatal error; (2) the conversation, in any event, was not an act in furtherance of the conspiracy; and (3) reception of the evidence violated the "other crimes" rule.

The first point is based on the premise that the failure of the Grand Jury to consider what developed at the trial as act 10 precludes consideration of the act by the petit jury. In *United States* v. *Negro*, 164 F. 2d 168 (2d Cir. 1947), appellants were convicted for a narcotics conspiracy. There was no evidence of the only overt act alleged in the indictment, but the government argued that

---

[14] Subject, of course, to the requirement that the act be in furtherance of the conspiracy, discussed *infra*.

another overt act had been proved. This court reversed for lack of evidence of the overt act alleged in the indictment because the trial judge had instructed the jury only as to this act and had not instructed the jury as to the proven (but unalleged) act. To avoid a problem at the impending retrial, the court considered the question of proving unalleged acts (*id.* at 173):

> We believe that, at least for some purposes, the overt act is not part of the crime. . . . Thus if, in the instant case, there had been no proof of any overt act other than that alleged, and if the defendant Bruchon had been acquitted, we think that, under the doctrine of double jeopardy, he could not subsequently have been convicted for a conspiracy on the same facts with the single exception that, in the second trial, a different overt act was alleged and proved. We think, also, that an overt act is not part of the crime in the sense that the act alleged must be proved, where another unalleged overt act is proved. . . .
>
> Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, such a variance justifies a request for continuance because of surprise.

Appellant Pacelli asks this court to disavow this dictum. Contrariwise, appellants Armone, Grammauta and Viscardi argue that the *Negro* case requires reversal here. The latter contention is clearly erroneous since, under *Negro,* a conviction may rest on an overt act not charged in the indictment. As to Pacelli's frontal attack on *Negro,* the rule of that case has also been accepted by three other courts of appeals, *Napolitano* v. *United States,* 340 F. 2d 313, 314 (1st Cir. 1965); *Culp* v. *United States,* 131 F. 2d 93, 100 (8th Cir. 1942); *Worthington* v. *United States,* 1 F. 2d 154, 155 (7th Cir.), cert. denied, 266 U. S. 626

(1924), although there is authority to the contrary, *Fredericks* v. *United States*, 292 Fed. 856 (9th Cir. 1923), and we see no reason not to adhere to the rule in this circuit.[15] Moreover, the essence of the charge against appellants is a criminal agreement. A principal reason for the overt act requirement in a conspiracy prosecution "is simply to manifest 'that the conspiracy is at work,' *Carlson* v. *United States*, 187 F. 2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates* v. *United States*, 354 U. S. 298, 334 (1957).[16] Where, as here, the unalleged overt act dealing with the counterfeit bill was inadvertently substituted for the alleged overt act dealing with conversation about commissions, defense counsel joined in focussing the jury's attention on testimony as to the former, no objection was made to the trial judge raising this issue, a fortiori no continuance was sought, and there was ample testimony as to the overt act referred to by the trial judge, reversal for the reasons urged by appellants is unwarranted.

As to the second contention, an overt act is an act "committed in pursuance of the agreement." *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants seem to argue that conversation cannot be an "act," and that, in any event, this conversation was not in furtherance of the conspiracy. However, much talk is "action" with direct legal consequences; *e.g.*, people "decide," "promise," and "reject." *Cf.* decisions holding telephone conversations to be overt

---

[15] For favorable law review comment on the rule, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 992-93 (1959).

[16] See Developments, *supra* note 15, at 945-49 (other rationales for overt act requirement).

acts, *Singer* v. *United States*, 208 F. 2d 477, 480 (6th Cir. 1953); *Bartoli* v. *United States*, 192 F. 2d 130, 132 (4th Cir. 1951); *Smith* v. *United States*, 92 F. 2d 460, 461 (9th Cir. 1937). Here we have a warning to co-conspirator Hedges by defendant Armone, after the conspirators had gone to the trouble of tracing the source of the counterfeit bill. We hold that this conversation qualified as an "act." Moreover, the jury could find that Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators. The trial court left the issue of furtherance to the jury. We cannot say as a matter of law that the jury could not reasonably have concluded that this conversation, viewed in the context of the other evidence, was in furtherance of the conspiracy. Reliance on *Grunewald* v. *United States*, 353 U. S. 391 (1957), is misplaced, for there the Court stated (*id.* at 405):

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

In the present case, the objectives of the conspiracy—importation and distribution of narcotics—had not been completed at the time of the conversation. And we cannot say that the successful accomplishment of the crime did not necessitate concealment. Cf. *Mount* v. *United States*, 333 F. 2d 39, 44 (5th Cir.), cert. denied, 379 U. S. 900 (1964); *Atkins* v. *United States*, 307 F. 2d 937, 940 (9th Cir. 1962).

Finally, Armone and Grammauta argue that the reception of evidence pertaining to the counterfeit bill, and evidence relating to what may have been a different counterfeit bill (won in a dice game by Armone's nephew and given to Armone's sister-in-law), violated the rule excluding proof of other crimes. But Armone himself was not shown to have passed or received counterfeit money knowingly and voluntarily; moreover, his relatives were not shown to have been knowingly connected with the counterfeit money either. This argument is without merit.

H. Armone and Grammauta

Hedges's testimony

Defendants Joseph Armone and Stephen Grammauta raise nine separate grounds, in addition to those already discussed, for reversing the jury verdict. Four of them have to do, in whole or in part, with the testimony of Charles Hedges, the chief witness for the prosecution. Thus, these appellants attack the adequacy of the trial court's instruction under *United States* v. *De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), which held that in certain circumstances prior sworn testimony of a witness could be admitted as substantive evidence, rather than for impeachment only. Hedges had previously been prosecuted in Connecticut, see *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963), and had given testimony contrary to his testimony in this trial. The court below charged that the jury could consider the prior testimony in weighing credibility, and could also consider it as affirmative evidence in this trial. An objection below to the instruction (apparently not made by these two appellants) related to the possibility that both the earlier and current testimony could be false. The trial court thereupon

charged:

> Secondly, you remember I talked about Hedges' testimony at the Connecticut trial and I told you it is for you to judge on which occasion he was telling the truth. But, of course, it is equally within your province to find he was testifying falsely on both occasions. You can do that. You can find that or you can determine on which occasion he was telling the truth and in which part of his testimony he was telling the truth.

These instructions were clear and correct.

Armone and Grammauta next claim that cross-examination of Hedges was unduly limited. We have examined the specific instances cited and find no abuse of discretion in the limitation of this five and one-half day cross-examination. These appellants next contend that the federal rule allowing conviction on uncorroborated testimony of accomplices is not one of unvarying application, that it is the "better practice" to require corroboration and that the circumstances of this case call for the better practice. But a short time ago, this court stated:

> We cannot understand why they insist that the testimony of accomplices must be corroborated. The federal rule is clearly to the contrary. [Citations.]

United States v. *Kelly*, 349 F. 2d 720, 767 (2d Cir. 1965). Appellants also suggest we hold the accomplice testimony in this case incredible as a matter of law. The argument is completely without merit. *United States* v. *Aviles*, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U. S. 974, 982 (1960).

Denial of continuance to Armone

Appellant Armone next contends that the court erroneously denied his motions for severance on account of ill-

ness during the trial. Armone had been shot in the chest some sixteen months before the trial started, but, according to his brief, still suffered at trial from a "pancreatic abscess which required external drainage through an abdominal incision that had to be kept open as it would heal over from time to time and produce a backing up of pus which caused a severe toxic condition." Trial commenced on May 3, 1965, and the first mention thereafter of Armone's condition to the court was on May 19, when the trial judge, after being informed of a jury tampering incident, remanded all defendants. Thereafter, the judge allowed Armone to be treated by his personal physician on two occasions. On Tuesday, June 8, the trial was adjourned so that Armone could be taken to the hospital where he was examined by a government physician. The following day counsel moved for a severance, but a few hours of trial were held in the afternoon. The court stated that it would observe defendant. On June 10, the court was informed that Armone was being detained in the hospital, and two adjournments followed until Monday, June 14. That day and the next, counsel again objected to proceeding with trial, but the trial continued. Both sides rested on Tuesday, June 15, and after another day's adjournment final arguments started on Thursday, June 17. On the afternoon of June 15, the court took testimony from Armone and two physicians on the issue of competence to stand trial; the court also heard defendant again and another doctor on June 17, and a fourth doctor on July 9, the latter date falling after conclusion of the trial.[17]

---

[17] Since the judge had denied the motions before the trial ended, we have considered the record as it was before him then. It should be noted, however, that not infrequently competence to stand trial is determined after the fact or *nunc pro tunc*. E.g., *United States* v. *Tom*, 340 F. 2d 127 (2d Cir 1965) (*per curiam*); *Johnston* v. *United States*, 292 F. 2d 51 (10th Cir.), cert. denied, 368 U. S. 906 (1961); *Wells* v. *United States*, 239 F. 2d 931 (D. C. Cir. 1956) (*per curiam*); see 18 U.S.C. § 4245.

Appendix B.

The determination of competence to stand trial is, of course, basically a question of fact and, as with appellate review of most factual issues, the higher court bows to the lower court unless an abuse of discretion is manifest. *United States* v. *Tom*, 340 F. 2d 127 (2d Cir. 1965); *United States* v. *Shotwell Mfg. Co.*, 287 F. 2d 667, 672 (7th Cir. 1961), aff'd on other grounds, 371 U. S. 341 (1963); *Stein* v. *United States*, 263 F. 2d 579, 581-82 (9th Cir. 1959); *United States* v. *Alker*, 260 F. 2d 135, 157 (3rd Cir. 1958), cert. denied, 359 U. S. 906 (1959). Here at most there was a conflict of testimony, which the trial judge was in the better position to resolve. Despite Armone's testimony to the contrary, there was sufficient medical testimony to establish Armone's competence to stand trial during the period under attack. In the light of this evidence and the trial judge's grant of adjournments, we cannot say that he was clearly in error and abused his discretion.

Alleged other crimes testimony and guilt by association

Appellants Armone and Grammauta also claim that they were denied a fair trial by proof of other crimes or a propensity to commit them. Beside the counterfeit bill incidents, dealt with *supra*, they point to two answers given by Hedges on cross-examination. In one, responding to a question about an offer of a job, Hedges said that Joseph Cahill (a severed defendant) proposed that Hedges rob a bookmaker for "some defendants." The judge promptly instructed the jury to disregard this answer. The other answer came about as follows:

> Q. Did you testify at the Connecticut trial that you went down and brought Mr. Aspelund into the hotel?
> A. If I did your defendants would be up there—

After immediate objection the question was rephrased and a different answer given. We think that these two brief,

isolated outbursts, at most ambiguous, unavoidable when dealing with witnesses of Hedges's admitted background, coming out on cross-examination by the defense, and with no prosecutorial intent to improperly prejudice defendants, were patently harmless when considered in conjunction with the curative steps taken.

In the same vein, appellants also claim that admission into evidence of a nightclub photograph showing some defendants seated together and a telephone number book containing the names of several defendants was reversible error because they improperly created an impression of guilt by association. However, the prosecutor's summation included the following:

> The government is not trying to prove guilt by association, but isn't it some evidence of the conspiracy, that these people knew each other and that these people went out with each other?
>
> • • • • •
>
> Once again, ladies and gentlemen, I am not talking about guilt by association, I am just talking about these people knowing each other and associating with other as some evidence.

At this point, the court told the jury "you can't find guilt by association" and that it had to "consider all the evidence as to the association." Thereafter, in his charge, the judge also said:

> Now, of course, you should not infer membership in a conspiracy merely because of family relationship, merely because some of the defendants may have had their pictures taken together, merely because of friendship between alleged co-conspirators. Of course, you can't find any defendant guilty merely by association.

Since agreement is an element of conspiracy, evidence of association is relevant. The judge properly charged the jury on how to handle the issue.

Since the photograph and telephone-and-address book had been seized incident to or after the arrest of co-defendant Cahill, appellants also claim that they were admissions of a co-conspirator made after his arrest and hence were inadmissible against them. But the evidence involved here was not offered under the admission exception to the hearsay rule to assert the truth of matter contained in an out-of-court statement. A photograph is not an out-of-court statement at all; both items of evidence, moreover, were in existence before the end of the conspiracy. A similar objection to the admission of ten to twelve kilos of heroin is also without merit.

Single or multiple conspiracies

Armone and Grammauta next contend that the evidence showed multiple conspiracies and thus prejudicially varied from the single conspiracy charged in the indictment; implicit in this argument is an alleged insufficiency of evidence linking them to a single conspiracy. They also assert that, in any event, the instructions were not adequate and the verdict was mistaken on this point. Arguing variance, appellants rely essentially on facts disclosed in *United States* v. *Cianchetti, supra,* in which Hedges was a defendant and, it is claimed, the present defendants were not mentioned at trial. But in trial 1 there can be a conspiracy with several defendants, and in trial 2 there can be a different conspiracy with some of the same defendants or co-conspirators, or even the same conspiracy with other, different defendants being tried for the first time, all without fatal multiplicity in any case. The judge's charge adequately distinguished between a single conspiracy and multiple conspiracies. As to any supposed insufficiency of

evidence, the spare summary of the record *supra* (pp. 2537-2539) shows clear support for the jury's verdict. In any event, there is no indication that any variance rose to sufficient dimensions to be prejudicial. *United States* v. *Agueci,* 310 F. 2d 817, 827 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Appellants claim that the court should have guided the jury by marshalling the facts, and should have told the jurors that Armone had to be connected with activities prior to entry of new sources of supply of narcotics, or those activities must be disregarded in determining his guilt. No exception was taken by counsel to the charge on these two grounds, and we do not find "plain error" under Fred R. Crim. P. 52(b). *Compare United States* v. *Kahaner,* 317 F. 2d 459, 479-80 n. 12 (2d Cir.), cert. denied, 375 U. S. 835, 836 (1963), *with United States* v. *Kelly,* 349 F. 2d 720, 757 (2d Cir. 1965).

Missing witness instruction

Finally, these appellants assign as error the court's missing witness instruction concerning one Andy Dillon. The court said:

> You recall that Godwin testified that he received a counterfeit $100 bill and said that it came from one Andy Dillon. Said Andy Dillon was not called to testify by either the government or the defendants, although I am informed that he was in the courtroom during the course of the trial.
>
> Mr. Dillon could have been called by either side as a witness so that from the failure of either side to call him, you may infer that his testimony might have been unfavorable to either the government or to the defendants. But it is equally within your discretion to draw no inference at all from the failure of the government or of the defendants to call Dillon as a witness.

Appellants point out that Dillon was associated by the evidence with Armone, that the government refused to stipulate and the court refused to allow counsel to tell the jury that Dillon had been subpoenaed by the government, and that the instruction included mention of the fact that Dillon was sitting in the courtroom during the trial (a fact brought to the court's attenion by defense counsel). Counsel, after the charge, requested that the jury be told the government had subpoenaed Dillon and that it should disregard any portion of the charge insofar as it allowed the drawing of an inference against defendants.

The instruction given by Judge Bonsal was a correct statement of the law, and may be given in the absence of a request. *United States* v. *Llamas,* 280 F. 2d 392, 393 (2d Cir. 1960). The reference to Dillon's presence, while unnecessary, could not be prejudicial, since it merely indicated the foundation for the instruction. If the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented. In any event, no argument is made that Dillon was not in the courtroom. That the government may have been responsible for Dillon's presence is irrelevant. Appellants are in reality attacking the essence of the missing witness charge, *i.e.,* that the jury can draw an unfavorable inference from failure to put a witness on the stand; a defendant does not have the privilege of keeping the missing witness charge from the jury. Even if the government had not subpoenaed Dillon, the charge could have been given present some showing that he was available, if the other conditions for the charge were fulfilled. Hence, that the government subpoenaed Dillon is irrelevant. Since Dillon was undisputably available for each side, the charge was not erroneous. *United States* v. *Comulada,* 340 F. 2d 449, 452 (2d Cir.), cert. denied, 380 U. S. 978 (1965); *United States* v. *D'Angiolillo,* 340 F. 2d 453, 457 n. 5 (2d

Cir.), cert. denied, 380 U. S. 955 (1965); cf. *United States* v. *Bergman*, 354 F. 2d 931, 935 (2d Cir. 1966) (witness equally unavailable to both; no inference should be drawn).

III. Viscardi

Statute of limitations

In addition to joining in contentions already discussed, appellant Viscardi raises two arguments applicable only to him. First, he attacks the court's charge on the statute of limitations. He argues that the evidence showed that before September 30, 1959 (the earliest date not barred by the statute), he took narcotics from Hedges, and after that time he delivered them to Hedges, and, therefore, the court should have instructed the jury to find "exactly which conspiratorial agreement he had entered into, and that such agreement continued past September 30, 1959." The short answer is that a shift in role, as appellant terms it, would not affect the statute of limitations. The conspiracy's vital elements (members and purposes) remained the same after September 1959, and we cannot say that a different job—at least one with as little difference as that involved here—would entail a different conspiracy vis-a-vis the conspirator involved. *United States* v. *Borelli*, 336 F. 2d 376, 385 (2d Cir. 1964), cert. denied, 379 U. S. 960 (1965), is not in point; that case dealt with the shifting objectives of the conspiracy. Viscardi was not tried for making a delivery to or receiving narcotics from Hedges; the charge was conspiring to effectuate much more generalized objectives, and whether he was a deliverer or recipient on any particular occasion would not be determinative of what he had conspired to achieve. It is, therefore, unnecessary to deal with the government's contention that Viscardi's function as "plant man" never did change.

Appendix B.

Multiple representation

Vicardi also claims that he was prejudiced by sharing counsel with the two Armones and Grammauta and that the trial court's failure to apprise him of "the hazards inherent in sharing an attorney with the Armones and Grammauta" was error. The short answer to Viscardi's contention is that almost six months prior to trial, the government requested the court to inquire into the existence of a possible conflict of interest. The following interchange between government counsel and counsel for Viscardi, the two Armones, and Grammauta appears on the record:

> Mr. Jacobs: . . . [Y]our Honor, this case was on on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.
>
> The Court: I assume he doesn't or he would have brought it to the attention of the Court.
>
> Mr. Lewis: That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

Viscardi relies upon *Glasser* v. *United States,* 315 U. S. 60 (1942), and *Campbell* v. *United States,* 352 F. 2d 359 (D. C. Cir. 1965). Nothing in *Glasser* requires the government or the court to take further steps after receiving such an assurance from an officer of the court. In *Campbell,* where a single attorney was retained by two defendants, the court reversed the convictions because the trial

judge did not inquire into whether the defendants knowingly accepted the risk of sharing defense counsel. We need not now decide how much of the *Campbell* case we accept as law in this circuit. We simply hold that the trial judge's inquiry of counsel as to possible conflict of interest in this case sufficed to protect any right Viscardi may have had in the matter. The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances. Viscardi argues that his counsel might have devoted more time to him in final argument. Viscardi also points out that he had no previous criminal record, that he was the only defendant to produce a character witness, and that the trial judge received many letters in his behalf recommending leniency in sentence. He contends that his counsel might have suggested that additional character witnesses should testify during the trial, had it not been for the fact that this would have reflected adversely upon Armone and Grammauta, who presented no character witnesses. However, these are not weighty arguments. We can take judicial notice of the fact that many who would touch pen to paper will not stand up to be counted in person under oath and in court. Also, brushing off a co-defendant in summation can be effective strategy.[18] Cf. *United States* v. *Burkeen*, 355 F. 2d 241 (6th Cir. 1966).

We have considered all contentions made by appellants. Having found no reversible error, we affirm the convictions.

Judgments affirmed.

---

[18] It should be noted that defendant Alfred Armone, who was represented by the same counsel and received approximately as much attention in counsel's closing remarks as defendant Viscardi, was acquitted.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Argument	7
Conclusion	23

CITATIONS

Cases:

Beck v. *Washington*, 369 U.S. 541	19
Caminetti v. *United States*, 242 U.S. 470	23
Culp v. *United States*, 131 F. 2d 93	11
Finley v. *United States*, 271 F. 2d 777, certiorari denied, 362 U.S. 979	11
Holmgren v. *United States*, 217 U.S. 509	23
Krulewitch v. *United States*, 336 U.S. 440	23
Lugo v. *United States*, 350 F. 2d 858	20
Napolitano v. *United States*, 340 F. 2d 313	11
Nash v. *United States*, 229 U.S. 373	11
Sheppard v. *Maxwell*, 384 U.S. 333	18
Stein v. *United States*, 263 F. 2d 579	23
Stirone v. *United States*, 361 U.S. 212	11
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	19

237-004—66——1

Cases—Continued

	Page
United States v. *Ansani*, 240 F. 2d 216, certiorari denied, *sub nom. Milner* v. *United States*, 353 U.S. 936	12
United States v. *Bentvena*, 319 F. 2d 916, certiorari denied, 375 U.S. 940	22
United States v. *Costello*, 352 F. 2d 948, certiorari granted on another ground, 383 U.S. 942	19
United States v. *Feldman*, 299 F. 2d 914, certiorari denied, 370 U.S. 910	18
United States v. *Gainey*, 380 U.S. 63	13, 14
United States v. *Gardner*, 202 F. Supp. 256	11
United States v. *Garfoli*, 324 F. 2d 909	11
United States v. *Kelly*, 349 F. 2d 720	23
United States v. *Marshall*, 355 F. 2d 999, certiorari denied, October 10, 1966, Nos. 119, 120, O.T., 1966	19
United States v. *Negro*, 164 F. 2d 168	11
United States v. *Shotwell Manufacturing Co.*, 287 F. 2d 667, affirmed, 371 U.S. 341	22
Wellman v. *United States*, 227 F. 2d 757, vacated, 354 U.S. 931	23
Statutes:	
18 U.S.C. 371	10
21 U.S.C. 173	4, 12
21 U.S.C. 174	2, 3, 4, 10, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 519

NICHOLAS VISCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 527

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 603

JOSEPH ARMONE AND STEPHEN GRAMMAUTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 363 F. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1966. The petitions of Armone and Grammauta for rehearing were denied on July 28, 1966. On August 10, 1966, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari on behalf of Pacelli and Viscardi to September 6, 1966. On August 26, 1966, the time for filing the joint petition of Armone and Grammauta was extended to September 26, 1966. Viscardi's petition was filed on September 3, 1966; Pacelli's on September 6, 1966; and the petition on behalf of Armone and Grammauta was filed on September 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the indictment's allegations concerning an overt act and the proof at petitioners' trial.

2. Whether the trial judge's instruction regarding the statutory inference of 21 U.S.C. 174 constituted an impermissible comment on Pacelli's and Armone's failure to take the witness stand.

3. Whether petitioner Pacelli was deprived of an unbiased jury because of three newspaper articles published four months before trial and a story which appeared in a magazine during trial.

4. Whether petitioner Viscardi was deprived of the effective assistance of counsel because his retained attorney, who assured the court that there was no conflict of interest, also represented three co-defendants.

5. Whether petitioner Armone was deprived of a

fair trial when the district court ordered the trial to continue and denied a motion for severance notwithstanding petitioner's ill health.

6. Whether the testimony of an accomplice was admitted under proper instructions.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense * * * the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on a one-count indictment charging them with conspiring to violate the federal narcotics laws (21 U.S.C. 173 and 174) by importing and selling narcotics. The following sentences of imprisonment were imposed: Viscardi—5 years; Grammauta—8 years; Armone—15 years; Pacelli—18 years. Armone and Pacelli were also fined $20,000 each. The court of appeals affirmed.

The evidence showed that from 1956 to 1960 petitioners and others[1] were engaged in a conspiracy to import huge amounts of heroin from France for distribution in New York City. Among the couriers of the three principal exporters were a French seaman (R. 196a–218a), a pilot and steward employed by Air France (R. 102a, 245a–277a), and several diplomats, including the Guatemalan Ambassador to the Benelux countries (R. 263a). The heroin was usually delivered in the United States to co-conspirator Joseph Cahill (R. 197a–200a, 247a). In June 1958, Charles Hedges (the main prosecution witness) was employed by Cahill to accompany him as he received a shipment from the airline pilot (R. 87a). The parties travelled from their homes to the vicinity of Rockefeller

[1] Petitioners and eight others were indicted by the grand jury and charged with conspiring among themselves and with sixteen unindicted co-conspirators unlawfully to import narcotics from France and distribute them in the United States. Alfred Armone and Alexander Schoenfeld, two defendants, who were tried with petitioners, were acquitted.

Center, where Hedges observed Cahill meet a French courier and obtain from him a package of narcotics (R. 87a). Cahill gave the courier an envelope containing money (R. 88a). Hedges was then told to deliver the package to Cahill's home (R. 89a). After that incident, and until November 1959, Hedges was regularly employed by Cahill to receive packages of narcotics from the couriers and to deliver them to domestic wholesalers (R. 90a–150a). After a brief period of inactivity, Hedges resumed his employment in January or February 1960, until October 1960, when Nicholas Calamaris, another co-conspirator whose duties were the same as Hedges, was arrested (R. 171a–172a).

Petitioner Pacelli was one of the wholesalers who received his narcotics from Cahill. In September or October 1958, Hedges was introduced to Pacelli, who was advised, "We are going to have Charlie [Hedges] deliver up to you. So you pay him on your side and we will take care of him on our side" (R. 111a). From then on, Hedges received $200 per delivered kilogram package, half of which was paid to him by Pacelli (R. 111a–112a). On occasions when delivery was made by transferring a package from the trunk of one car to the trunk of another, Pacelli furnished one of the vehicles (R. 117a–118a). Whether Hedges transported Pacelli's deliveries to Pacelli personally or to his agents, he was generally paid by Pacelli or co-conspirator Michael Ricucci, another domestic wholesaler who worked with Pacelli (R. 126a, 139a, 154a, 155a, 170a).

Petitioner Joseph Armone provided some of the funds to import the narcotics, and he directed their disposition. Hedges turned the money received from the domestic wholesalers over to Armone, who used it to make further acquisitions of narcotics (R. 131a, 151a). In late 1959 or early 1960, Pacelli asked Hedges to secure three kilograms of heroin. Hedges reported the request to Armone, who expressed reluctance to fill Pacelli's order because he had not been prompt with his payments. At Hedges' urging, Armone relented. One half-hour later, Armone advised Hedges that he had arranged to fill Pacelli's order (R. 150a–151a). In April or May 1960, Hedges told Armone that he wanted more money because he was assuming a disproportionate share of the risk. Armone consented to a raise. From then on, Hedges received $150 from Armone and $100 from Pacelli per delivered kilogram (R. 158a–159a).

Petitioner Viscardi's role in the conspiracy was to store the narcotics for the importers until needed (R. 100a). Hedges had several dealings involving Viscardi. In June 1959, he accompanied petitioner Grammauta, who served as an assistant to Armone and the other importers (R. 131a, 143a), to Viscardi's house, where Grammauta retrieved a 6-to-10 pound package of heroin for delivery to Pacelli's agent, Carmine Guanti (R. 140a–141a). In August 1959, Hedges, Cahill and co-defendant Alfred Armone removed two suitcases containing narcotics from a locker in a train station and delivered them to Viscardi's house (R. 141a–142a). During the latter part

of 1959 and early 1960 Hedges procured various amounts of heroin from Viscardi and delivered them to Guanti. He received payment from either Pacelli or Guanti (R. 146a–147a).

ARGUMENT

1. The indictment listed 11 overt acts alleged to have been committed by various conspirators in furtherance of their illegal plan (R. 25a–27a). Overt act 10 alleged (R. 27a):

> In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960 * * * the defendant Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York.

In response to a motion for a bill of particulars, the government alleged that this overt act was committed "[d]uring March or April of 1960, approximately between 1:00 P.M. and 5:00 P.M., inside 207 Second Avenue, New York City" (R. 54a, 529a). At trial the government's evidence showed that in April or May 1960, at Lulu's Bar, 207 Second Avenue, Joseph Armone complained to Hedges that he had been given a counterfeit $100 bill by Hedges' friend, Godwin (R. 164a–165a).

Because of the statute of limitations, the trial court in his closing instructions ordered the jury to disregard the first nine overt acts described in the indictment and stated that "your task will be to find beyond a reasonable doubt that at least one of the overt acts 10 or 11, in fact, took place after Sep-

tember 30, 1959" (R. 453a–454a).[2] The court then read overt act 10 and commented (R. 454a):

> As I recall the evidence here—and I say it is your recollection that controls, and not mine—overt act number 10 refers to the conversation alleged to have taken place between Joseph Armone, Hedges, and Godwin [an unindicted alleged co-conspirator] concerning the counterfeit $100 bill. As I recall it, Hedges said that Joseph Armone was concerned about the counterfeit bill, concerned about the trouble that it would cause.

Then the court recited overt act 11, which dealt with a delivery of a package containing narcotics by co-conspirator Frank Sherbicki to Hedges in June 1960. The court instructed that it was essential for the jury to find that either overt act 10 or 11 had been committed in order to convict (R. 455a).

Following several hours of deliberation the jury requested that the testimony relating to overt acts 10 and 11 be read to them (R. 522a). The pertinent portions of the transcript were selected with the approval and cooperation of all counsel (R. 522a–526a). After first reminding the jury that the indictment was not to be considered as evidence, the court ordered the reporter to read the selected testimony (R. 526a–527a). Counsel for Viscardi requested that the government's bill of particulars be read. This was denied by the

[2] Although the indictment alleged that overt act 9 was committed during the limitations period, the court eliminated that act from the jury's consideration because the government's evidence failed to establish unequivocally that the act in question was committed at the time alleged (R. 453a–454a).

court, who remarked that the difference between the location set forth in the indictment and in the bill of particulars was not a fatal variance (R. 527–528). Thus as to overt act 10 the jury heard only the trial testimony relating to the counterfeit $100 bill. Following some further deliberation the jury submitted this request (R. 528–529):

> First, count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960. When the request was made this afternoon to rehear count 10 testimony, we heard testimony that occurred at Lulu's Bar and the luncheonette across the street from Lulu's. These two locations are five blocks, approximately, apart.
>
> Can 122 Second Avenue be thought of as the vicinity of 122 Second Avenue or is it the location of another separate event?

The judge permitted each counsel to comment on the question in closed session. Then, over the objection of defense counsel, he instructed the jury that the term "vicinity" had no rigid legal definition (R. 538a):

> You have done very well, because everything you say here is exactly the truth. Overt act No. 10 does refer to the vicinity of 122 Second Avenue. That is what the indictment says. The testimony you heard did refer to Lulu's Bar and the restaurant across the street. As you have indicated, they are some distance apart. But it is for you to determine, do you think that these two places, one is in the vicinity of the other? It is your judgment on that. There is no hard and fast rule. What

do you think? And I think that is about the only way that I can answer that.

The jury rendered its verdict on June 22, 1965. On July 8, the district judge summoned counsel to chambers and informed them that a mistake had been made with respect to overt act 10. The court had, since the trial, reviewed grand jury minutes and had learned that the grand jury did not hear evidence regarding the counterfeit bill, but that overt act 10 was based upon a conversation between Hedges and Joseph Armone at Lulu's Bar in March or April 1960, wherein Hedges was granted a pay increase of $50 per kilogram for each delivery (R. 551a). A hearing was held on July 29, 1965, at the conclusion of which the court denied counsel's motion to set aside the verdict and for a new trial. The court noted that the defense had been given Hedges' grand jury testimony and that defense counsel had participated with the government attorney in "culling" the testimony which was read in response to the jury's particularized request (R. 588a–589a).

There is no merit to the claim (Viscardi Pet. 12–14; Pacelli Pet. 38–40) that as a result of these circumstances petitioners were convicted on a charge different from that on which they were indicted. The indictment alleged a conspiracy in violation of 21 U.S.C. 174—a statute which does not expressly make the commission of an overt act an essential element of the offense.[3] Hence, any variance from the indictment as

[3] While the general conspiracy statute, 18 U.S.C. 371, requires the proof of an overt act, the narcotics conspiracy statute does not in terms require the doing of "any act to effect the object of the conspiracy." It has been suggested that, as is true of the

to the particular overt act presented to and found by the jury related to an immaterial detail of the proof.[4] And since petitioners were all well aware of the theory on which this overt act was being presented to the jury, the alleged variance could not have taken them by surprise or have affected their defense. The court below was therefore correct in rejecting petitioners' claim on the basis of *United States* v. *Negro*, 164 F. 2d 168 (C.A. 2); *Finley* v. *United States*, 271 F. 2d 777 (C.A. 5), certiorari denied, 362 U.S. 979; *Napolitano* v. *United States*, 340 F. 2d 313 (C.A. 1); *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8). See also *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal.).

Moreover, the government's proof was sufficient to support overt act 11 as well as the particular overt act 10 which the grand jury intended (R. 158a–159a). Hence this is not a case in which the jury's verdict could be supported on no theory other than the one mistakenly presented to the jury. Since the grand jury testimony of Hedges was available to petitioners and they could have determined, just as the district judge did after the trial, that Hedges did not tell the grand jury about the incident involving the counterfeit $100 bill, the district court properly concluded

---

conspiracy provisions of the Sherman Act (*Nash* v. *United States*, 229 U.S. 373, 378), no overt act need be proved to convict under 21 U.S.C. 174. See *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7); *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal.).

[4] *Stirone* v. *United States*, 361 U.S. 212, on which petitioners rely, concerned a variance on an essential element of the offense charged in the indictment, and it is, therefore, inapposite.

that the mistake in which they participated could not be used by them as the basis for a new trial.

Nor is there any substance to the subsidiary claims relating to this incident. The court's instructions made it quite clear that the jury was unanimously to decide whether each of the two overt acts was supported by the evidence, and did not authorize a "non-unanimous verdict" (Pacelli Pet. 38, n. 33). The jury's question whether the location alleged in the indictment was in the "vicinity" of the site where the overt act occurred demonstrated alertness rather than "total confusion" (Pacelli Pet. 37). By leaving the resolution of that issue to the jury, the district judge was, as the court below observed (Pacelli Pet. App. 21a–22a), leaving to the jury an issue which should have been resolved by an instruction favorable to the government. *United States* v. *Ansani,* 240 F. 2d 216, 223 (C.A. 7), certiorari denied, *sub nom. Milner* v. *United States,* 353 U.S. 936. Hence the error if there was any, was favorable to petitioners. And finally, the contention of petitioners Armone and Grammauta that the discussion concerning the counterfeit $100 bill was not in pursuance of the conspiracy (Armone Pet. 37–40) was correctly rejected by the court below on the ground that the objectives of the conspiracy were still being pursued at that time and the jury could well have concluded that "Armone was attempting to stave off investigation of the conspiracy by warning Hedges of the dangers of passing counterfeit money among the conspirators" (Armone Pet. App. 27a).

2. In his closing instructions the trial judge recited the applicable provisions of 21 U.S.C. 173 and 174,

and said the following regarding the statutory inference (R. 444a):

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.

Pacelli and Armone allege that the court's reliance upon the statutory language constituted an impermissible comment on their failure to testify (Pacelli Pet. 7–20; Armone Pet. 5, 45). In *United States* v. *Gainey*, 380 U.S. 63, 71, n. 7, this Court observed that "the better practice" in cases involving statutes of this kind would be to instruct the jurors that they may draw an inference unless the *evidence in the case* provides a satisfactory explanation, thereby avoiding any suggestion that the defendant is under an obligation to testify. In *Gainey* itself, however, this Court refused to reverse convictions on the basis of the charge given (380 U.S. at pp. 70–71):

> Furthermore, in the context of the instructions as a whole, we do not consider that the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. Cf. *Bruno* v. *United States*, 308 U.S. 287. The judge's overall reference was carefully directed to the evidence as a whole, with neither allu-

sion nor innuendo based on the defendant's decision not to take the stand.

Petitioners contend that the district judge's instructions here were less circumspect in this regard than the instructions in *Gainey*. This claim is refuted, we submit, by a reading of the instructions as a whole (R. 437a–493a, 510a, 514a–522a, 526a–528a, 538a–539a). The jury must have considered the instructions regarding the statutory inference of knowledge of illegal importation in the context of the format used throughout the remainder of the instructions. In summarizing each defendant's theory of defense, for example, the court stated the defenses as if they had come from the defendant's lips, even with respect to those who had not taken the stand (see R. 458a–475a). It must have been obvious to the jury that the judge could not have been referring to petitioner Pacelli's own testimony when he charged, for example, that "[t]he defendant Pacelli denies that the evidence shows that he was a member of the conspiracy" (R. 471a) since Pacelli did not testify. Similarly, we submit, the jury did not mistake the instruction that it might infer illegal knowledge "unless [the defendant] has given you a satisfactory explanation of his possession" (R. 444a) as a reference to the defendant's personal testimony or to a failure to testify.

Moreover, shortly before completing his lengthy instructions, the trial judge cautioned that while three defendants, including Viscardi and Grammauta, testified, they were not required to do so. As to the remaining defendants, the court stated (R. 485a–486a; emphasis added):

> The other defendants did not testify and you will not consider this as any evidence whatsoever against them *or as any basis of any presumption or inference unfavorable to them.* You will not permit this to weigh in the slightest degree against any of the defendants who did not testify nor should this matter enter into your deliberations. This is because the government must prove a defendant guilty beyond a reasonable doubt, a defendant is not required to prove his innocence.

Consequently, if the jury had mistakenly construed the earlier portion of the charge as imposing an obligation on petitioners to testify, the concluding part of the charge plainly dispelled such an interpretation. In these circumstances, the court below properly rejected petitioners' claim as "hypertechnical" (Pacelli Pet. App. 9a).

Nor is there substance to petitioners' claim that the trial judge's failure to define "may" and "infer," when stating that evidence of possession of the drug "may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation * * *" (Pacelli Pet. App. 6a), converted the inference to a conclusive presumption. No request was made at trial that the judge present a detailed explanation of these easily understood terms, and there is no reason to believe that the jury misunderstood their meaning. Moreover, in this case, where the evidence showed that importation of the narcotics and delivery to wholesalers was an essential part of the conspiracy, the statutory inference was not as indispensable to the government's case as may be true in the usual nar-

cotics offense. The circumstantial evidence alone, apart from the statute, would have supported a finding of illegal knowledge.

3. The question of publicity was handled with propriety. On January 11, 1965, four months before the trial began, the *New York Daily News* featured a story about a missing young woman. The woman was identified as a close companion of Pacelli. It was reported that Pacelli, "who trafficked in narcotics, was under surveillance at the time of her disappearance" (Pacelli Pet. App. 38a), and that the suspicious disappearance may have resulted from her association with Pacelli and her knowledge of his role in a vast "dope ring" (Pacelli Pet. App. 39a). Another article appeared in the inside pages of the *Daily News* on the following day (Pacelli Pet. App. 40a). A month before trial, the district judge asked the United States Attorney to request local news media not to publicize the trials (Pacelli Pet. App. 12a–13a).

At the commencement of *voir dire*, the court advised the prospective jurors (R. 66a):

> Now, ladies and gentlemen, in the past few weeks there have been newspaper, magazine, radio and television accounts dealing generally with the subject of narcotics, narcotic problems and various phases of it. Of course you must reach a verdict in this case solely on the basis of the evidence presented at the trial and you must not be influenced in any way by anything you may have read in the press or heard on the radio or television. So I would like to ask all of you at this time whether there is anything which you have read, heard or seen on the gen-

> eral subject of narcotics which would interfere with your ability to render a fair and impartial verdict and to reach your verdict solely on the basis of the evidence produced at the trial? Have any of you ladies and gentlemen, as far as you can recall, read anything in the press or heard anything on the radio or television relating to these charges that you have just heard this morning or relating to these defendants?

No prospective juror responded affirmatively to these questions. The court also admonished each juror not to read anything that could possibly relate to this case or to the subject of narcotics or organized crime. This admonition was repeated at the close of each daily session of the trial.

Trial commenced on May 3, 1965. Midway through the trial, there appeared in *Popular Science* magazine a six-page article entitled "The Dope-Smuggling Diplomats" (Pacelli Pet. App. 42a–47a). The article described a dope-smuggling ring which used diplomats as couriers. The pictures of seven co-conspirators appeared and Cahill's name was mentioned, but no reference to Pacelli or any of the defendants tried with him was made. After being informed of the magazine article, the court advised the jury (R. 300a):

> My attention has been called to a recent article in a magazine of national circulation, not one of the really popular ones that you know, but still a magazine of national circulation, which mentions the name of people who have testified at this trial and mentions some of the names of other people you and I have heard in the course

> of the trial. And since this has been brought to my attention, I would just like to ask each of you whether you have seen that article?
>
> Well now, if you should see it or if anyone should call it to your attention, I would be very grateful if you will not read it, but come and tell me about it, don't tell your fellow jurors. Please do not read it, but come to me and I will talk to you about it.

At the conclusion of the trial, the trial judge advised the attorneys that he was satisfied that "none of the jurors knew anything about this article or read it" (R. 589).

A reading of the judge's careful questioning of the jurors and their apparently frank answers and demonstrated concern for the importance of their duty to render a fair and impartial verdict convincingly supports the judge's conclusion that the jury was in no way prejudiced by three news articles published four months before trial. There is no reason to believe that anyone who might have read the *Daily News* articles could recall them and use them to prejudice any defendant's right to a fair trial. There is absolutely no evidence that any juror knew of or read the article embedded in a 226-page magazine whose total national circulation was less than 1½ million per month.[5] The publicity was not as flagrant as in the

[5] Pacelli's argument relies heavily upon the fact that the information contained in the magazine article emanated from a government source. Whether or not the explanation of the Federal Bureau of Narcotics (R. 589a–597a) supports Pacelli's allegation is not determinative of the central issue—the impartiality of the jury as affected by the pretrial publicity. *Sheppard* v. *Maxwell*, 384 U.S. 333; *United States* v. *Feldman*, 299

cases relied upon by petitioner and did not revolve about petitioner Pacelli, who was mentioned only indirectly in the *Daily News* article, and not at all in the magazine. Thus, the publicity could hardly have been said to be so intensive or extensive that the court could not believe the answers of the jurors and would be compelled to find bias as a matter of law. *Beck* v. *Washington*, 369 U.S. 541; *United States* v. *Costello*, 352 F. 2d 948 (C.A. 2), certiorari granted on another ground, 383 U.S. 942. See also *United States* v. *Marshall*, 335 F. 2d 999, 1005–1008 (C.A. 9), certiorari denied, October 10, 1966, Nos. 119, 120, O.T., 1966.

4. Petitioner Viscardi was represented at trial by an attorney who was also retained by three other defendants—Grammauta, Joseph Armone and Alfred Armone. On November 12, 1964, almost six months prior to trial, government counsel requested the court to inquire whether there was any possible conflict of interest. The following occurred (R. 56a–57a):

> The COURT: This case was on last week, was it not?
>
> Mr. JACOBS: That is correct, your Honor, this case was on on Monday and at that time the government stated it wished Mr. Lewis in court because the situation in this case is a novel situation, Mr. Lewis representing four defendants in a conspiracy case, and I wish the

F. 2d 914 (C.A. 2), certiorari denied, 370 U.S. 910; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959. And there is no basis whatever in the record on which to rest an inference that the government intentionally sought to prejudice public opinion against these petitioners by releasing the information which appeared in *Popular Science* magazine.

Court to ask Mr. Lewis that if after being in this case now for over a month he knows of any conflict or any reason why he couldn't represent these four defendants.

The COURT: I assume he doesn't or he would have brought it to the attention of the Court.

Mr. LEWIS. That's right; I discussed it with my clients and they have advised me they feel there is no conflict.

The COURT: All right.

In the face of the assurances given by petitioner Viscardi's counsel, an attorney experienced in the trial of criminal cases, that there was no conflict and that the matter had been discussed with his clients, the court was not required to take further steps. Moreover, there is no factual support for the allegation that Viscardi's trial counsel gave him less than full representation. Sound reasons of trial strategy may have supported his failure to call certain character witnesses, and the brevity of his summation may have been intended to convey to the jury that there was little proof behind the prosecution's charges. Indeed, the same attorney spoke as briefly on behalf of co-defendant Alfred Armone, and the latter was acquitted. See *Lugo* v. *United States,* 350 F. 2d 858 (C.A. 9).

5. In January 1964, petitioner Armone had been shot in the left lower chest area (R. 361a). He was hospitalized for three months, but required occasional treatment thereafter for a chronic pancreatic abscess which had to be drained of the accumulation of pus (R. 362–363). When needed, two or three days of treatment would relieve the condition (R. 366a). The

trial of these petitioners started in May 1965, some sixteen months after the shooting. Twice during the trial the court acceded to requests for early adjournment to enable Armone to see his doctor (R. 232a, 284a). On June 8, after the government had rested its case, Armone's counsel advised the court that Armone was ill and could not attend the trial. The trial was adjourned to the afternoon of June 9 after a government doctor examined Armone at a hospital and reported that he felt Armone would be available on the following day (R. 336a–339a). On June 9 Armone came to court and a two-hour session was held. Defense counsel moved for a severance, asserting that Armone was physically unable to continue. The court denied the motion and indicated that he would carefully observe the defendant (R. 340–341a). The testimony that day consisted of a character witness for petitioner Viscardi and three witnesses called for the purpose of impeaching the credibility of Hedges (R. 432a).

On the following day the court was informed that the doctors would not permit Armone to attend the trial. A postponement until Monday, June 14, was thereafter ordered. Armone remained in the prison ward of Bellevue Hospital, where he received treatment. Armone was returned to the courtroom on Monday, June 14, with the consent of the resident in general surgery who was responsible for the patients in the prison ward at Bellevue (R. 547a). On that day defense counsel continued to protest that Armone was too ill to participate in his defense. The trial proceeded, and the court later conducted a hearing on

the question of Armone's health during which four doctors, including Armone's personal physician, testified, as well as Armone himself.

Before ruling orally on petitioner Armone's motion for a severance the district court summarized the testimony of petitioner and the doctors (R. 430a–431a) and reviewed the evidence which had been presented on the two days when Armone was allegedly in a "toxic" condition (R. 432a). The court concluded, "[U]nder all these circumstances I do not see that any prejudice has resulted to Mr. Joseph Armone and I, therefore, * * * will deny your motion for a severance" (*ibid.*). Petitioner contends that this amounted to a holding that a defendant is entitled to be present at his trial "only when unfavorable testimony is being adduced" (Armone Pet. 31). The district court's decision was based on no such proposition of law. The district judge subsequently made it entirely clear that he considered the impact of the testimony presented during Armone's illness (when he was of course physically present in court) as "a factor" (R. 433a), not that it was the sole ground of his decision. It was proper for the court, in making the discretionary decision whether to continue with the trial notwithstanding the illness of one of several defendants, to consider not only how incapacitating the illness was but how significant the testimony was to the charge against that defendant or to his defense. The ruling in this case, which rested on all the circumstances, was not an abuse of discretion. See *United States* v. *Bentvena,* 319 F. 2d 916, 932 (C.A. 2), certiorari denied, 375 U.S. 940; *United*

States v. *Shotwell Manufacturing Co.*, 287 F. 2d 667, 672 (C.A. 7), affirmed, 371 U.S. 341; *Stein* v. *United States*, 263 F. 2d 579 (C.A. 9); *Wellman* v. *United States*, 227 F. 2d 757, 776 (C.A. 6), vacated on other grounds, 354 U.S. 931.

6. Petitioners Armone and Grammauta challenge the rule in the federal courts that the uncorroborated testimony of an accomplice is sufficient to sustain a conviction. See *Holmgren* v. *United States*, 217 U.S. 509; *Caminetti* v. *United States*, 242 U.S. 470, 495; *Krulewitch* v. *United States*, 336 U.S. 440, 454; *United States* v. *Kelly*, 349 F. 2d 720, 767 (C.A. 2). This case warrants no exception to that rule. The testimony of Hedges was amply supported by four other co-conspirators and the documents and other exhibits introduced at trial. The evidence abundantly established a large narcotics conspiracy, involving many transactions and immense quantities of drugs and money. The jury's verdict, which found four of six accused guilty, was amply supported by the evidence summarized in our Statement, pp. 4–7, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBERG,
Attorneys.

NOVEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 17 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 603

JOSEPH ARMONE and STEPHEN GRAMMAUTA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON JOINT PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS ARMONE AND GRAMMAUTA

JEROME LEWIS
Attorney for Petitioners
Joseph Armone and Stephen Grammauta
66 Court Street,
Brooklyn, New York

32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

IN THE

Supreme Court of the United States

October Term, 1966

No. 603

JOSEPH ARMONE and STEPHEN GRAMMAUTA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS ARMONE AND GRAMMAUTA

I. The Issue as to Petitioner Armone's Illness During the Trial

(Replying to Br. in Opp. 20-23)

The Government at p. 21 of its brief states that "Armone was returned to the courtroom on Monday, June 14, with consent of the resident in General Surgery who was responsible for the patients in the prison ward at Bellevue (R. 547a)." From the record reference here given by the Government it appears that the Government is speaking of Dr. Richard J. Kostecki, whose testimony is printed in part at pages 546a-548a of the Joint Appendix. This reference by the Government to Dr. Kostecki's testimony is subject to objection for two reasons. *First,* Dr. Kostecki's testimony may not properly be referred to at all for the purposes of the within petitions for certiorari; as pointed out

in the joint petition for certiorari for Armone and Grammauta (pp. 17-18, 18 fn., 21 fn., 27, 28), neither the District Court nor the Court of Appeals took Dr. Kostecki's testimony into consideration, because that testimony was not received until after the District Court had already decided the motion for severance of Armone on medical grounds and indeed after the Jury had rendered its verdict. *Second*, the item from Dr. Kostecki's testimony which the Government has cited at p. 21 of its brief does not meaningfully support the Government's above quoted statement, because the page cited by the Government (R. 547a) indicates only that Dr. Kostecki did "release" Armone to come to Court on Monday, June 14, but when Dr. Kostecki was asked whether his release of Armone denoted that Armone was competent to understand the Court's proceeding, the question was limited to the situation on the preceding Wednesday, June 9 (R. 547a-548a).*

The Government's only reply to our contention that the District Court in effect held that a defendant is entitled to

---

* Dr. Kostecki's testimony extends from R. 4293 to R. 4358. The portion printed in the Joint Appendix (R. 546a-548a) covers only the stenographic minutes at R. 4293-4297. Nowhere else in the lengthy testimony of Dr. Kostecki did he state that he considered Armone competent on Monday, June 14. The closest that Dr. Kostecki came to giving an evaluation of Armone's condition on Monday, June 14 was in answering a question by the Court at R. 4355-4356 in which Dr. Kostecki said that he did not think Armone was "toxic" at 8 A.M. Monday morning, June 14. We intend no disrespect when we say that this latter opinion of Dr. Kostecki is worthless in the light of his testimony as a whole, which we trust this Court may wish to examine if it should accept the Government's tender of the Kostecki testimony notwithstanding that both of the Courts below expressly disregarded it; as noted, the entirety of the Kostecki testimony appears at R. 4293-4358. The worthlessness of Dr. Kostecki's testimony emerges most dramatically when it is read also in the light of the testimony of his own aide at Bellevue Hospital, Dr. Donohue (Joint Pet. Cert. for Armone and Grammauta, pp. 20-25).

be present at his trial only when unfavorable testimony is being adduced, consists of an argument that this was not "the sole ground" of the District Court's decision, and that it was a proper part of the District Court's exercise of a discretionary function to consider, along with the question of how incapacitating the illness was, the question of "how significant the testimony was to the charge against that defendant or to his defense" (Br. in Opp. 22). These suggestions by the Government as to the extraordinary idea of depriving a defendant of the right to be *effectively* present at his own trial only when unfavorable testimony is received, does not reach the mark, either analytically or legally (constitutionally). If it is constitutionally wrong to deny a defendant this right of being present at his trial "solely" on the basis of some test as to the favorable or unfavorable character of the testimony, then it is just as wrong to deny this right *partly* on the latter basis. Furthermore, the Government's answer on this branch of the case apparently concedes, by silence, that in fact unfavorable testimony was received during Armone's undisputed illness; we have described heretofore what this unfavorable testimony was, and indeed how gravely prejudicial it was and how ardently the prosecutor at the trial used this unfavorable testimony—we refer to the testimony of Nicholas Calamaris, the prosecutor's cross examination of Calamaris having elicited answers unfavorable to an important alibi-type defense for Armone *per* the witness Costantino (Joint Pet. Cert. for Armone and Grammauta, pp. 16-17, 30-31).

Moreover, the Government's argument on this topic (Br. in Opp. 22-23) does not mention at all that the Court of Appeals totally (and inexplicably) ignored this matter of favorable versus unfavorable testimony received dur-

ing Armone's illness (Joint Pet. Cert. for Armone and Grammauta, p. 30).

It seems unjust that so novel and constitutionally dubious a doctrine as that here involved—that the constitutional right of the defendant to be present at his criminal trial may depend, either wholly or partly, on some *ad hoc* evaluation of the favorable *versus* the unfavorable character of the testimony received during his absence (or incapacity in the courtroom owing to illness)—should be allowed to be insinuated, as it were, into the corpus of the Federal case law, merely because a Trial Judge has "hedged" (again, we intend no disrespect) in his formulation of the "holding", or because a Court of Appeals has chosen a *sub silentio* method of affirming what the Trial Judge has done. The injustice of this, its constitutional offensiveness, is of course aggravated in a most concrete way in the present case because, as seen, *undisputedly* there was unfavorable testimony received during the defendant's incapacity in the present instance.

Notwithstanding the perhaps equivocal way in which the Trial Judge handled the issue, and the Court of Appeals' *sub silentio* form of approval of the Trial Judge's action, can there be any doubt, can any realistic practising criminal lawyer doubt, can this Court doubt, that the novel doctrine here involved which so drastically curtails the constitutional right of a defendant in a criminal case to be present at all stages of the trial, will henceforth be very much indeed in the forefront of the minds of prosecutors and Courts—and not only in the Second Federal Circuit?

This Court's protective intercession is needed; and it is needed the more so in this case precisely because the fright-

ening new doctrine in question apparently bids fair to be brought into the Federal case law by indirection, rather than by outright explicit "holding".*

II. The Government's Suggestion That No Overt Act Allegations Are Necessary in Conspiracy Prosecutions under 21 U.S.C. §174

In replying to petitioners contentions concerning Overt Act 10, the Government commenced its argument with the surprising suggestion that allegation and proof of an overt act is not an essential element of the conspiracy offense under 21 U.S.C. §174 (Br. in Opp. 10-11). Of the two cases cited by the Government, one is not in point, namely, *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7 1963), because *Garfoli* held only that an overt act need not be alleged and proved as to *each* conspirator-defendant. The other case cited by the Government, *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Cal. 1962) is in point, but this District Court decision stands solitary in the Federal case law on the subject. In the Second Circuit, at least, it appears to have been taken for granted down to the present time that allegation and proof of an overt act is required in conspiracy prosecutions under 21 U.S.C. §174. E.g., *United States* v. *Borelli*, 336 F. 2d 376 (C.A. 2 1964); *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2 1962); *United States* v. *Aviles*, 274 F. 2d 179 (C.A. 2 1960). In the instant case the Court of Appeals referred to the *Gardner* case, *supra*, but it noted

* The decisions cited by the Government at pp. 22-23 of the Brief In Opposition, for the proposition that "the ruling in this case, which rested on all the circumstances, was not an abuse of discretion", are not in point. None of those cases (Bentvena, Shotwell Manufacturing Company, Stein, Wellman) involved any issue of favorable *versus* unfavorable testimony.

that the Government did not urge any such contention, and it therefore deemed it unnecessary to explore the issue. If the law is now to be declared as being that allegation and proof of an overt act under 21 U.S.C. §174 are unnecessary, this Court's voice should be heard on so important a subject.

CONCLUSION

It is respectfully submitted that the joint petition for certiorari on behalf of petitioners Armone and Grammauta should be granted.

Respectfully submitted,

JEROME LEWIS,
Attorney for Petitioners
Joseph Armone and
Stephen Grammauta.